No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1487

CONTINENTAL CASUALTY COMPANY, PETITIONER,

v.

CHAMPION INTERNATIONAL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

CITATIONS

CITATIONS—Continued

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Continental Casualty Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 546 F.2d 502. The opinion of the district court on the issue of liability (App. D) is reported at 400 F. Supp. 978. Its separate opinion on the issue of damages (App. E) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B) was entered on December 9, 1976, and a timely petition for rehearing with suggestion for rehearing *en banc* (App. C) was denied on January 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals violated the principles established in *Erie R.R.* v. *Tompkins* by refusing to apply the laws of any State in adjudicating a State-created contract action arising under its diversity jurisdiction.

2. Whether the decision below improperly burdens interstate commerce by confusing the sources of the law to be applied in diversity cases in interpreting standardized terms of commercial insurance policies used nationwide.

3. Whether the court of appeals should have refused to resort to State law because application of the decisional law of the appropriate State would have imposed a substantial burden on interstate commerce.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8, ¶ 3 of the United States Constitution provides, in pertinent part:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . .

Article VI of the United States Constitution provides, in pertinent part:

> This Constitution . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby. . . .

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . . .

STATEMENT

In this diversity case, the court of appeals resolved a question concerning the proper definition of a standard

provision of comprehensive commercial liability insurance policies in use throughout the United States contrary to the decisions of the highest court of the State in which the action arose and in a manner which conflicts with decisions of other federal courts of appeals. In so doing, the court below has created nationwide confusion as to whether State law controls the interpretation of such contract provisions in diversity cases. This conflict will adversely affect consumers of defective products, manufacturers, their insurance carriers, and interstate commerce in manufactured products and in insurance. The decision below and its rationale also present important constitutional questions concerning the manner in which inferior federal courts should exercise their diversity jurisdiction where application of State law could substantially impede interstate commerce. This case thus presents the Court with the question whether there should be an independent constitutional limitation derived from the Commerce Clause on the application of the doctrine of *Erie R.R.* v. *Tompkins* in diversity cases.

Champion International Corporation, a New York company, instituted this action in the Supreme Court of the State of New York seeking to recover $1,000,000 from Petitioner Continental Casualty Company, an Illinois corporation, for products liability losses purportedly covered by an Excess Liability Insurance Policy issued to it by Petitioner. Pursuant to 28 U.S.C. 1441, Continental removed the case to the United States District Court for the Southern District of New York on the ground of diversity of citizenship. *See* 28 U.S.C. 1332(a).

Both parties agreed that New York law applied to define the operative terms of the policy. The district court invoked New York law, as required by *Erie*, but applied that law differently from the way the New York Court of Appeals previously had applied it. Petitioner appealed to the Second Circuit for review of the district

court's application of New York law. The Second Circuit, deviating from the principles followed by the other courts of appeals, refused to examine State law and instead apparently construed the contract under principles of federal common law.

The proceedings in the district court established that, among other activities, Champion purchased vinyl-covered plywood panels from a sub-contractor and sold them without modification to many manufacturers for installation in the interior of houseboats, house trailers, motor homes and campers. Champion normally sold the panels to the manufacturers in small lots, as their production schedules required.[1] The panels were shipped either from stocks maintained at Champion's branches or directly by the sub-contractor (J.A. 159).[2]

Many of the panels sold by Champion in 1969 and 1970 proved to be defective. After installation, the vinyl covering began to peel off or delaminate from the plywood backing (App. A, *infra*, pp. 2a-3a; App. D, *infra*, p. 19a). Over 1400 vehicles manufactured in many different states over a period of several months by at least twenty-six different firms were damaged by the defective panels. No vehicle sustained more than $5,000 in property damage. Champion eventually settled the claims of the vehicle owners for an amount in excess of $1.5 million and looked to its insurers for indemnification (App. A, *infra*, pp. 3a-4a).

Champion was partially protected against property damage claims by two insurance policies. The first, a

[1] For example, one manufacturer obtained its panels through approximately 105 separate purchases between January 1969 and March 1970 (App. D, *infra*, p. 19a n.1).

[2] All references to "J.A." refer to the Joint Appendix filed in the court of appeals.

comprehensive general liability policy written by Liberty Mutual Insurance Company, included products liability losses within its coverage. It provided $100,000 in coverage for each "occurrence" of property damage, up to a $200,000 aggregate limit, and subject to a $5,000 deductible "per occurrence" (App. A, *infra*, p. 3a; J.A. 490a, 510-511). The second policy, issued by Petitioner, provided excess liability insurance over and above the primary coverage of the Liberty Mutual policy (J.A. 447, 459-467). It provided coverage of up to $1,000,000 for "any one occurrence" of property damage, subject to a $1,000,000 annual limit (App. A, *infra*, p. 3a). Thus, Champion itself absorbed the first $5,000 of loss per occurrence of property damage, Liberty Mutual assumed the next $100,000 of damage, and Continental contracted to assume any loss above those amounts up to an additional $1,000,000 for a single occurrence.

Continental's excess liability policy incorporated by reference the terms of the underlying Liberty Mutual policy for purposes of defining which losses were covered by Continental. As the district court correctly noted, the provisions of the Liberty Mutual policy are standardized and are used by many companies in comprehensive liability insurance policies in force throughout the United States (App. D, *infra*, p. 24a).[3] The policy provided that the insurer would pay all sums for property damage "caused by an occurrence" up to the limit of the policy, subject to the $5,000 deductible per occurrence

[3] Such standardized products liability insurance provisions cover an enormous volume of manufactured goods transported in interstate commerce and sold in all states. Indeed, the writing of such products liability insurance itself has a substantial effect on interstate commerce. *See United States* v. *South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 540-541 (1944). In 1975, the total net premiums collected for commercial products liability insurance equalled an estimated $1.6 billion. United States Department of Commerce, *Product Liability Insurance-Assessment of Related Problems and Issues* 40 (March 1976).

(App. A, *infra*, p. 3a; J.A. 491). The term "occurrence" was defined to mean

> an accident, including injurious exposure to conditions, which results . . . in bodily injury or damage neither expected nor intended from the standpoint of the insured (App. D, *infra*, pp. 20a-21a; J.A. 493, 500).

For purposes of determining the limit of the insurer's liability, the policy stipulated that

> [all] property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as arising out of one occurrence (App. A, *infra*, p. 5a; J.A. 498-499).

The policy contained no geographical limitation on its coverage within the United States (J.A. 493). Similar contracts to this effect are in force nationwide.

Petitioner conceded that the damage resulting from the defective panels constituted property damage within the meaning of the Liberty Mutual policy. Therefore, the pivotal issue was whether the hundreds of delaminations of plywood panels, independently detected in many states, constituted but one occurrence of harm, or whether the damage suffered by each of those vehicles was a separate occurrence under the contract. Because no vehicle suffered more than $5,000 in damages, Champion would recover nothing under either policy, by operation of the deductible clause, if each incident of delamination were considered a separate "occurrence."

In the district court,[4] Petitioner argued that under settled New York law, each instance of delamination constituted a separate "occurrence" because the injuries occurred at different times and at different places and because no one instance of delamination caused any other. Construing New York law differently, the district

[4] The parties had agreed that New York law governed the interpretation of the contract (App. A, *infra*, p. 7a n.5).

court held, as Champion argued, that the insured must prevail if the policy could reasonably be construed in its favor. It further found that the language of the policy was "ambiguous" as to whether each delamination should be considered a separate occurrence thereunder (App. D, *infra*, p. 24a). The court concluded that the interpretation of the contractual definition urged by Champion—that there had been but one "occurrence" of harm—"may not be the only reasonable interpretation, but it is a reasonable one" (*idem.*). The court therefore entered judgment against Petitioner for $1,000,000 plus interest (App. E, *infra*, pp. 27a-28a).

Petitioner appealed, challenging the district court's construction of New York law. The court of appeals, one judge dissenting, affirmed without applying State law. The majority conceded that the term "occurrence" had been construed in different ways in prior State and federal diversity cases requiring interpretation of that term in similar insurance policies. But, examining the policy "in light of the business purposes sought to be achieved by the parties" (App. A, *infra*, p. 6a), it found that the contract was not ambiguous. Accordingly, it held that it need not consider the laws of any State in determining the parties' rights (*id.*, pp. 7a n.5, 8a).

Turning to the merits, the majority held that there had been but one "occurrence" within the meaning of the policy. It ruled that by basing liability on a "per occurrence" rather than on the optional "per claim" basis, the parties intended to gauge coverage not "*on the basis of individual accidents* giving rise to claims, but rather on the underlying circumstances which resulted in the claim for damages" (*id.*, p. 6a (emphasis supplied)). The majority supplied two definitions of the single "occurrence" it found. First, it suggested that the occurrence was Champion's "delivery of defective panels" (*id.*, p. 4a). Second, it stated that the damage arose from continuous or repeated exposure to the same

general conditions, but offered only the following elliptical description of those conditions (*id.*, p. 7a):

> Exposure there was, when Champion sold the paneling, and during this process, it was continuing and repeated.

The dissenting judge agreed that the insurance policy was not ambiguous but reached the opposite conclusion as to its meaning. He observed that Champion's selection of a "per occurrence" basis over a "per claim" basis of coverage did not demonstrate that the parties intended that all injuries stemming from a single, ultimate cause should be considered as one "occurrence" of harm. As he correctly found, it was wholly fortuitous that under the circumstances of this case, each event causing damage gave rise to only one claim (*id.*, pp. 9a-10a). He rejected the notion that the delivery of defective panels itself could be considered a single "accident" or the "same general condition", repeated exposure to which caused injury, because Champion had made at least twenty-six, if not far more, separate deliveries. He also argued that the majority's observation that Champion had suffered "exposure" was nothing more than a play on words: When it sold the panels, Champion "exposed" itself to legal liability, but that event did not constitute physical exposure to some injurious phenomenon, such as radiation, heat or moisture, which traditionally is regarded as a single occurrence under this contractual definition (*id.*, pp. 10a-11a).

Moreover, the dissent observed that because of the small monetary amount of each claim, the insurer and the insured found themselves advancing arguments normally presented by the other side in accident insurance litigation. The insurer usually wants injurious events to be construed as a single occurrence, so that its payments under the policy will be limited. It is normally in the insured's interest to argue for multiple occurrences so that more consumer claims will be adequately covered. The dissent expressed the concern that the precedential

value of the definition of these standardized terms advanced by the majority on these peculiar facts might lead to an unjustifiable reduction in insurance benefits available to offset consumer claims in ordinary products liability cases (*id.*, pp. 12a-13a).

Neither the district court, the court of appeals nor the New York court upon whose decisions the parties relied ever considered the effect of its decision on interstate commerce in insurance or in the insured goods.

REASONS FOR GRANTING THE WRIT

This case involves consideration of the responsibility of inferior federal courts in diversity cases to apply State law and to avoid creating substantial impediments to interstate commerce. The court of appeals has interpreted a term of art in a standardized insurance policy in use nationwide without either applying the law of the State in which the action arose or considering whether its decision (or the decisional law of that State) would inflict any burden on interstate commerce in insurance or the insured products. Moreover, this case involves a fundamental and original question regarding the source of the law to be applied by the inferior federal courts in diversity cases where application of State decisional law could create a substantial burden on interstate commerce. This question is particularly ripe for consideration by the Court at this time, when the utility and the appropriate future role of diversity jurisdiction are being freshly considered[5] and increasing reliance is being placed on the sensitivity of State courts to federal constitutional interests.[6] The contested term of art determines whether

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[5] *See, e.g.*, Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A.J. 443, 444 (1976); Friendly, *Federal Jurisdiction: A General View* 3-4, 139-152 (1973); *cf.* H.R. 761, 95th Cong., 1st Sess. (1977).

[6] *See Stone* v. *Powell*, 428 U.S. 465, 493-494 n. 35 (1976); *Swain* v. *Pressley*, No. 75-811, decided March 22, 1977, slip op. at 10-11; *cf. Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-344 (1816); THE FEDERALIST No. 82.

persons liable for the defective manufacture of mass produced goods which have inflicted injury on multiple consumers can recover from their insurers. Therefore, this case potentially is of practical and pervasive importance, both in terms of the administration of justice and the constitutional requirement that State laws not burden interstate commerce in the absence of a substantial State interest.

1. In the exercise of their diversity jurisdiction, federal courts generally enforce State-created rights. They therefore normally apply the laws of the appropriate State, including the conclusive determinations of the highest court of that State as well as its statutory law. *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938); 28 U.S.C. 1952. But the court of appeals expressly refused to apply the law of any State in interpreting this insurance policy and thereby denied Petitioner due process of law.[7]

Both parties conceded, and the district court found, that the law of New York governed this diversity action. The court of appeals nevertheless ruled that it was not required to follow the law of any State because the underlying insurance policy was unambiguous on its face. Interpreting Champion's selection of a "per occurrence" basis for the deductible in light of an unidentified body of principles of contractual construction, the court found that the parties did not intend "to gauge coverage on the basis of *individual accidents* giving rise to claims," but rather on the basis of all claims Champion became legally obligated to pay because of property damage (App. A, *infra*, p. 6a & n.3 (emphasis supplied)).

[7] The court of appeals stated (App. A, *infra*, p. 8a):

> we need not consider the applicable state rules for the interpretation of insurance policies which were discussed by the court below on the assumption that the policy in question was ambiguous.

See also App. A, *infra*, p. 7a n.5.

However, the underlying policy explicitly defines an "occurrence" giving rise to a right of recovery in terms of an "accident" (App. D, *infra*, pp. 20a-21a). And despite its familiarity in other contexts, when used in liability insurance policies, the word "accident" is a term of art whose meaning cannot be determined on its face. State courts have adopted at least three different definitions of "accident," depending upon which of three conflicting theories of causation they follow.[8] *Arthur A. Johnson Corp.* v. *Indemnity Insurance Co.*, 7 N.Y.2d 222, 227-229, 196 N.Y.S.2d 678, 681-684, 164 N.E.2d 704 (1959); *see* Annotation, 55 A.L.R.2d 1300 (1957). These theories can produce substantially different results when applied to the same set of facts. *Johnson, supra*, 196 N.Y.S.2d at 683-684. Therefore, a federal court required to interpret this term in a diversity case must resort to the law of the State in which the action arose.

The precise question involved in this case has been authoritatively resolved under New York law. In interpreting the meaning of "occurrence" in a liability insurance policy, the New York Court of Appeals has expressly rejected the causation theory adopted by the majority below, that there is but one "occurrence" simply because all damages can be traced back to a single, ultimate act of negligence.[9] *Hartford Accident & Indemnity Co.* v.

[8] Because the courts have been in persistent disagreement over the causation principles properly applied where an error at one point in a multi-tiered distribution system produces discrete injuries to multiple consumers in succeeding stages, the insurance industry so far has been unable to eliminate this conflict by redrafting the standard policy terms. With each attempt to clarify the definition of the "accident" or "event" that triggers the insured's right to compensation, the same conflict of authority has reappeared. *Compare Maurice Pincoffs Co.* v. *St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971), *with Union Carbide Corp.* v. *Travelers Indemnity Co.*, 399 F. Supp. 12 (W.D. Pa. 1975).

[9] Moreover, as the dissent correctly noted, the majority erred in applying its own theory to the facts of this case. Whether the "general condition" giving rise to liability is the "sale" or the

Wesolowski, 33 N.Y.2d 169, 173-174, 350 N.Y.S.2d 895, 899, 305 N.E.2d 907 (1973). Rather, it follows the rule that there are as many "occurrences" as "events of an unfortunate character that [take] place without one's foresight or expectation." *Id., quoting from Johnson, supra*, 196 N.Y.S. 2d at 683. It calculates the number of separate "events" by determining whether the instances of damage were remote in time and space from each other and whether one incident of injury caused another. *Idem; see Sturges Mfg. Co.* v. *Utica Mutual Life Ins. Co.*, 37 N.Y. 2d 69, 371 N.Y.S. 2d 444, 332 N.E. 2d 319 (1975). Accordingly, since there was no allegation of a spatial or temporal relationship among the scattered instances of delamination or that any one instance of delamination caused another, Petitioner would not have been liable for any amount under its policy if the court below had followed this approach (*see* App. A, *infra*, p. 4a). *Cf. Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945). We submit that if the Second Circuit had looked to and followed New York law, it would have recognized the district court's error and reversed.

Erie and its progeny establish that in the face of the determination of an issue by the courts of the appropriate State, the Constitution requires a federal court adjudicating a diversity case to adopt and apply the State rule. The court of appeals therefore violated a basic canon of our federal system of government, and decided an important issue of federal law in conflict with the decisions of this Court, by adopting its own theory of causation in construing the provisions of this insurance policy.

"delivery" of panels, the uncontroverted facts show that Champion made at least twenty-six separate sales or deliveries of plywood panels. Thus, even under the court of appeals' approach, there were at least twenty-six, if not many more, "occurrences" to which the deductible applied.

2. The decision below also conflicts with the decisions of at least two other courts of appeals which have been required to construe the meaning of "occurrence" in similar liability insurance policies. They have held that the question is governed by the law of the appropriate State. *See Maurice Pincoffs Co.* v. *St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971); *Hamilton Die Cast, Inc.* v. *United States Fidelity & Guaranty Co.*, 508 F.2d 417, 420 (7th Cir. 1975); *contra, Union Carbide Corp.* v. *Travelers Indemnity Co.*, 399 F. Supp. 12 (W.D. Pa. 1975). The decision below also conflicts in principle with numerous decisions of other courts of appeals holding that the synonymous operative term "accident" in such policies must be construed under State law. *See, e.g., Elston-Richards Storage Co.* v. *Indemnity Insurance Co.*, 194 F. Supp. 673 (W.D. Mich. 1960), *aff'd*, 251 F.2d 627 (6th Cir. 1961). This Court should, therefore, in the exercise of its supervisory power over the administration of justice, grant certiorari to resolve this conflict.

The grant of the writ is especially appropriate in this case because the court of appeals' decision could impose a substantial burden on interstate commerce. Insurance companies which do business in several states operate under inconsistent bodies of statutory and decisional law which often will produce different results on the same set of facts. Despite this conflict, the insurance industry has been able to establish a certain degree of predictability in the amount of its exposure to liability by selecting the State whose laws will govern the interpretation of a policy, either by express choice of law or by careful orchestration of contacts with a jurisdiction.

In the instant case, however, the Second Circuit has upset these commercial expectations. Deviating from the holdings of other courts of appeals, the court below has announced that the operative terms of insurance policies

within its jurisdiction will not be construed under State law, and has, instead, applied some unidentified body of federal common law principles. The Second Circuit includes the States of New York and Connecticut, which are the principal places of business of many major insurance companies as well as two of the country's leading manufacturing States. The effect of the decision below is to introduce uncertainty as to the source of commercial law to be applied to contracts covering a significant fraction of the country's commerce. The disruptive effect of this decision on insurance carriers and its correlative effect on the insureds will significantly burden that commerce. Moreover, by presenting the prospect that different bodies of law would govern in State courts and in federal diversity courts, the decision below threatens to reintroduce the vice of forum shopping that *Erie* was intended to eliminate. Accordingly, this case fully warrants the grant of certiorari.

Indeed, given the plain inconsistency of the decision below with *Erie*, we respectfully submit that this case is ripe for summary reversal and remand to the court of appeals for application of State law.

3. In addition, the court of appeals' decision leaves open the question whether it properly could have refused to follow *Erie* because application of State decisional law under these circumstances would have created an unconstitutional obstacle to interstate commerce. Whether the Commerce Clause introduces an independent constitutional limitation on the application of the *Erie* doctrine, which itself is constitutionally based (304 U.S. at 77-78), is a question of great importance to the federal system of government.

The Commerce Clause of the Constitution prohibits the States from impeding substantially the free flow of interstate commerce. *See, e.g., Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Gibbons* v. *Ogden*, 22 U.S. (9

Wheat.) 1 (1822). This Clause imposes a constitutional obligation on the federal courts not to enforce State laws which would significantly interfere with that commerce. *See Southern Pacific Co.* v. *Arizona, supra*. This obligation serves to limit the power of the States even if, as in the insurance field, Congress has not legislated in a particular area. *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976); *Freeman* v. *Hewitt*, 329 U.S. 249, 252 (1946); *see* 15 U.S.C. 1011-1012.

The decisions of the highest court of a State in construing and enforcing its laws are necessarily considered the acts of the State for purposes of determining whether that action violates the federal Constitution. *See American Federation of Labor* v. *Swing*, 312 U.S. 321 (1941); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-311 (1940); *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 234-235 (1897). As a practical matter, burdens on interstate commerce may arise equally from decisions of State courts adjudicating private contractual disputes as well as from their more familiar source, the implementation of State statutes. *Cf. Shelley* v. *Kraemer*, 334 U.S. 1, 12-23 (1948). If in a diversity case a federal court were to apply a State decision adversely affecting interstate commerce, the federal court itself would obstruct that commerce. Accordingly, there is unavoidable tension in such cases between the responsibility of an inferior federal court under the Commerce Clause and what this Court held in *Erie R.R.* v. *Tompkins, supra*, to be the constitutional obligation of the federal courts to apply State decisional law in diversity matters. In these circumstances, the Supremacy Clause requires that the conflicting State law yield to the imperative federal interest in preventing burdens on interstate commerce.

The potential effect of the court of appeals' ruling on interstate commerce is apparent on the face of its

opinion. Its decision has aggravated the existing conflict of authority on the meaning of the standardized term "occurrence". This conflict in interpretation substantially reduces the degree of certainty with which products liability insurers can predict the frequency and severity of the losses to which they are exposed. The premiums on such policies simply represent a probability estimate of future claims and expenses. *See* United States Department of Commerce, *Final Report of the Interagency Task Force on Products Liability Insurance—Insurance Study* 1-4 to 1-5 (March 1977). The decision below makes it even more difficult for the industry accurately to calculate the proper premium to charge and for the manufacturer to determine the optimum amount of products liability insurance it should carry. This conflict also increases the risk that consumers injured by defective products would not be able to obtain full compensation for their damages.[10] Under these circumstances, the precedential value of the court of appeals' interpretation of "occurrence" must have a significant effect on interstate commerce.

The court below did not consider whether application of State law to the underlying insurance policy would impose a substantial burden on interstate commerce. Nor did it consider whether any countervailing State interest outweighed the national interest in the unhampered flow of interstate commerce. It thereby failed to satisfy the only possible constitutionally sufficient justification for deviating from the normal rule of decision in diversity cases.

This Court has noted in controversial contexts that State courts have the same obligation and capability as

[10] As the dissenting judge below suggested, the majority's result-oriented definition of "occurrence", under the unusual circumstances produced by the operation of the $5,000 deductible, will greatly confuse the degree of protection available to the insured (and thus to the consumer) in the vast majority of products liability cases.

federal courts to uphold the federal Constitution and to balance federal constitutional interests against local laws and policy. *See* n. 6, *supra*. A grant of the petition in this case would afford the Court an unencumbered opportunity to expound upon these considerations in a commercial context and to instruct State and inferior federal courts in the appropriate method of weighing federal constitutional interests against State concerns, in order to reduce the number of occasions in the future in which federal courts would be required to become involved in the adjudication of State-created rights.[11]

Under these circumstances, the petition for a writ of certiorari should be granted, and the case should be remanded to the court of appeals either for application of State law or for development of facts which will permit an informed judgment whether the definition of "occurrence" adopted by New York would impose such a substantial burden on commerce that the federal courts are not bound to apply that law in this case.

But even if the Court were to conclude that the court of appeals did not violate *Erie* in adopting its own definition of "occurrence" without reference to State law, this case nonetheless warrants further review in order to consider the responsibility of federal courts, acting pursuant to a "transcendental body of law"[12], not to

[11] The need for such instruction in performing the balancing process is demonstrated by cases such as *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wis.2d 699, 144 N.W.2d 1, 18, *cert. denied*, 385 U.S. 990 (1966) (three of eight participating Justices voting to grant certiorari), in which the Wisconsin supreme court refused, despite a legitimate State interest, to apply its pioneer antitrust law to concerted anti-competitive conduct because of its perception of the potential effects of its application on interstate commerce. *See Southern Pacific* v. *Arizona*, *supra* (insufficient State interest supporting train-length statute); *cf. Raymond Motor Transport, Inc.* v. *Rice*, 417 F. Supp. 1352 (W.D. Wis. 1976), *probable jurisdiction noted*, No. 76-558, March 7, 1977.

[12] *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

create additional obstacles to commerce. The majority adopted a definition of a term of art in products liability policies in use nationwide without considering whether the resulting conflict of authority generated an unjustified burden on interstate commerce in insurance. Rather than helping to ameliorate the burden of this conflict of commerce, the court of appeals' decision has only worsened the current impasse. But a federal court purporting to interpret such a standard contractual term pursuant to general common law principles should consider the impact of its decision on the uniformity of interpretation conducive to the free flow of commerce. In such circumstances, a federal court has an obligation associated with the Constitution to help resolve, and not to exacerbate, a conflict of authority between circuits and among the States.

Similar problems could arise in diversity cases involving other industries if federal courts are permitted to apply general common law or equitable principles to choose among conflicting lines of State court authority. We respectfully submit that fresh consideration of the responsibilities of federal courts to the nation's commerce in such circumstances would be constructive and timely.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 1977.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 956—September Term, 1975

(Argued May 11, 1976 Decided December 9, 1976)

Docket No. 75-7664

CHAMPION INTERNATIONAL CORPORATION,
Plaintiff-Appellee,

—against—

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant.

Before: MOORE and TIMBERS, *Circuit Judges*, and NEWMAN,* *District Judge.*

Appeal from a judgment in the amount of $1,000,000 plus interest, entered by the United States District Court for the Southern District of New York, Hon. Gus J. Solomon, *Judge* (District Judge for the District of Oregon, sitting by designation), after a non-jury trial. The Court of Appeals affirmed, holding that, under the spe-

* Honorable Jon O. Newman, United States District Judge for the District of Connecticut, sitting by designation.

cific provisions of the insured's umbrella excess insurance policy, the sale of defective vinyl panels manufactured by a single source and sold by the insured to various customers constituted a "single occurrence" within the meaning of the policy.

Affirmed.

SEYMOUR SHAINSWIT, Esq., New York, N.Y. (Kronish, Lieb, Shainswit, Weiner & Hellman, Martin Teicher, of counsel), *for Plaintiff-Appellee.*

JACK HART, Esq., New York, N.Y. (Hart & Hume, Cecil Holland, Jr., of counsel), *for Defendant-Appellant.*

MOORE, *Circuit Judge*:

Continental Casualty Company ("Continental") appeals from a judgment of $1,320,139.64 ($1,000,000 plus interest) entered against it by the district court, after a non-jury trial, and in favor of Champion International Corporation ("Champion"). Jurisdiction exists under 28 U.S.C. § 1331.

This action involves the quite frequently perplexing problem presented in endeavoring to construe clauses in insurance policies. The policies in issue here were issued by Continental and Liberty Mutual Insurance Company ("Liberty Mutual") to Champion, to cover products liability losses which might be sustained by Champion. The material facts giving rise to the insurance claim underlying this action are not in serious dispute.

I.

Champion, in 1969 and 1970, amongst many other products, sold vinyl-covered paneling to manufacturers of houseboats, house trailers, motor homes and campers.

It purchased the paneling from Continental Vinyl ("Vinyl"). Not long after the panels had been installed in the various vehicles they commenced to delaminate, or in less technical parlance, to split apart. Naturally, claims were asserted against Champion for damages incurred, which in turn caused Champion to look to its insurance coverage.

Champion had two insurance policies: one, written by Liberty Mutual, covered products hazards and was in the amount of $100,000 for each "occurrence" ($200,000 aggregate) and subject to $5,000 deductible "per occurrence" for property damage liability; the second, written by Continental, an "Umbrella Excess Third Party Liability Policy" ("Umbrella Excess policy"), the policy period being three years from November 30, 1967 to November 30, 1970, provided for excess coverage over Champion's underlying insurance (namely, Liberty Mutual's policy) of $1,000,000 for "any one occurrence" and $1,000,000 in the aggregate for each annual period.

Thus, from a business point of view, Champion had assumed as a self-insurer the first $5,000 of any loss (the $5,000 deductible) it had the Liberty Mutual policy for the next $100,000 ($200,000 aggregate); and above these amounts, it had the Continental Umbrella Excess policy for $1,000,000.

As found by the trial court, some 1400 vehicles manufactured by some 26 different customer companies of Champion were damaged by the defective panels during the policy period.

Champion employed Liberty Mutual to investigate and settle such claims on a fee basis. As of September 13, 1974, Champion had paid Liberty Mutual $1,513,116.82 for property damage settlements which Liberty had effected. No question is raised as to the reasonableness of those settlements.

The trial proceeded on the basis of first determining liability. Once this was determined in plaintiff's favor, damages were easily ascertained because they were in excess of the upper limits of Continental's policy. Judgment thus was awarded for $1,000,000 plus interest.

II.

We are confronted with a situation in which the trial court, finding in favor of the plaintiff, said "Each party contends that the language of the policies is clear and unequivocal and supports its contentions", but addressing the sole issue, namely, "whether there was one occurrence which proximately resulted in damage to many vehicles, or whether the damage suffered by each of those vehicles was a separate occurrence", found in favor of the plaintiff because it held "that the contested language is ambiguous"; that plaintiff's interpretation was a "reasonable one"; and that that "is all plaintiff is required to prove". *See* Joint appendix at 159-165.

The sole appellate issue is the scope to be attributed to the word "occurence" in the policies.[1] If each occurrence means each of the 1400 individual installations of the defective panels, there is no liability under the Liberty Mutual policy because it is conceded that the damage in each instance did not exceed $5,000 and hence, would come within the $5,000 deductible provision. Nor would there be liability under the Umbrella Excess policy, for the same reason. If, on the other hand, the cause of Champion's damage, namely, the delivery of defective panels, is the "occurrence", then this delivery in the aggregate resulted in losses totalling some $1,600,000 of which $1,100,000 would be covered by the two insurance

[1] Appellant's arguments respecting the amount of damages awarded is inextricably bound up in the issue of whether one, or several, "occurrences" took place. The question of damages is factual, and is treated further in this opinion at p. 6049.

policies ($100,000 under the Liberty Mutual policy and $1,000,000 under the Umbrella Excess policy).[2]

Since Continental's policy was intended to cover excess liability, the question is presented: excess over what? Excess could only arise if coverage under Liberty Mutual's underlying policy was inadequate to compensate Champion for its losses. Therefore, reference must first be made to the appropriate provisions of the Liberty Mutual policy.

Under the Liberty Mutual policy, Liberty Mutual was to pay for property damage "caused by an occurrence" to a maximum of $100,000 payment for any one occurrence. Joint appendix at 491, 499, 510. To determine how the maximum was to be applied, the policy provided that "all . . . property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as arising out of one occurrence." Joint appendix at 498-9.

Continental's policy indemnified Champion for property damage (defined as "ultimate net loss") caused by or arising out of "each occurrence". Joint appendix at 448. Ultimate net loss was stated to be the "total sum which the Insured or any company as his insurer becomes obligated to pay by reason of [p]roperty damage. . . .". Joint appendix at 451.

As previously mentioned, this appeal centers around the question of what constitutes an "occurrence". The trial judge believed that the loss and the compensation therefor were determined on the basis of language in the

[2] Continental represents in its reply brief that "Champion has recovered over $1 million from Continental Vinyl's insurer and the manufacturers of the vinyl film and of the adhesive used in the panels in an action in California based on exactly the same facts as form the basis for the instant action." Reply brief at 12. Whatever rights Continental may have by way of subrogation or otherwise are not before this Court on this appeal.

respective policies which was ambiguous. We would prefer to examine the policies in light of the business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes.

We can immediately reject Continental's argument that there were 1400 separate occurrences. There could have been 1400 separate *claims* presented by the owners of the damaged vehicles against the 26 manufacturers; those are not before us. Such claims might have been funneled through the 26 manufacturers to Champion and Champion could have turned to the panel manufacturer, Vinyl, for protection, which it apparently did. However, Champion, as the seller of the defective paneling, was primarily liable and had paid out almost $1,600,000 on this liability. This amount was a sum which Champion (the *insured*) became *obligated to pay* by reason of *property damage* and hence, was encompassed within the Umbrella Excess policy's term "ultimate net loss".

Important in the interpretation of "occurrence" is Champion's selection, under the heading "Amount and basis of Deductible" in the Liberty Mutual policy, of a "per occurrence" basis (and its corresponding rejection of a "per claim" basis). This indicates that the policy was not intended to gauge coverage on the basis of individual accidents giving rise to claims, but rather on the underlying circumstances which resulted in the claim for damages.[3] Since the terms of the Liberty Mutual

[3] We agree with the district court in *Stauffer Chemical Co.* v. *Insurance Co. of North America*, 372 F. Supp. 1303, 1307 (S.D.N.Y. 1973), which held in an analogous situation, that:

> "The use of the term 'occurrence' . . . rather than the more restrictive term 'accident' is consistent with an intention to afford coverage for 'all sums which the insured shall become legally obligated to pay' regardless of how such liability arose."

The same analysis applies with equal force to the use, in the policies at bar, of the term "occurrence" instead of the term "claim".

policy were made controlling over the Umbrella Excess policy,[4] this reading of the Liberty Mutual policy applies equally to that issued by Continental.

Although "occurrence" has received different interpretations in the many cases cited by the respective parties,[5] the definition given that term by the Umbrella Excess policy is controlling unless it is ambiguous (and we find no ambiguity here). Exposure there was, when Champion sold the paneling, and during this process, it was continuous and repeated. There is no dispute that damage resulted which was unexpected. Whether the property damage occurred *during* the policy period is a factual question which was resolved in Champion's favor below;[6] this finding is not subject to reversal unless it is clearly erroneous.[7] We have examined the record and find that the evidence presented to the district court

[4] Endorsement No. 17 of the Umbrella Excess policy reads as follows:

> "It is understood and agreed that in the event of loss for which the assured has coverage under the Underlying Insurance, the excess of which would be recoverable hereunder, except for terms and conditions of this policy which are not consistent with the underlying, then, notwithstanding anything contained herein to the contrary, this policy shall be amended to follow the terms and conditions of the applicable underlying insurances in respect of such loss." Joint appendix at 487.

[5] *See, e.g., Hartford Acc. & Ind.* v. *Wesolowski*, 33 N.Y.S. 2d 169 (1973); *Sturges Mfg. Co.* v. *Utica Mut. Inc. Co.*, 37 N.Y. 2d 69 (1975); *Aetna Casualty and Surety Co.* v. *Martin Bros. Container and Timber Products Corp.*, 256 F. Supp. 145 (D. Ore. 1966).

Both parties in the instant case are agreed that New York law governs the controversy. However, it is not necessary for us to resort to state rules governing the construction of ambiguous insurance policies since, in our view of the case, the terms of the policies in question are not ambiguous.

[6] Opinion of the district court, joint appendix at 159.

[7] *See* F.R. Civ.P. 52(a).

fairly supports that court's conclusion; accordingly, the district court's finding will not be disturbed.[a]

Since we conclude that the plain language of the Umbrella Excess policy supports the liability of Continental on the insurance policy, we need not consider the applicable state rules for the interpretation of insurance policies which were discussed by the court below on the assumption that the policy in question was ambiguous.

For the foregoing reasons, the judgment of the district court is affirmed.

NEWMAN, *District Judge* (dissenting):

While I confess to some sympathy with the majority's effort to construe the terms of the insurance policy in a way that provides payments to the insured, I dissent from their conclusion because (1) in my view it is incorrect, and (2) unless the decision is limited to its precise facts, it can in the future lead to the *denial* to many insureds of substantial payments to which they are entitled.

1. We agree that the issue is whether in the circumstances indisputably established by the record there has been one or more than one "occurrence" within the meaning of the Liberty Mutual policy. We also agree that this issue can be resolved by the plain meaning of the words in the policy. We reach opposite conclusions as to that plain meaning.

The policy defines "occurrence" to mean "*an accident, including injurious exposure to conditions,* which results during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured . . . ." (Emphasis added). The policy

[a] *See generally,* 5A J. Moore, *Federal Practice* ¶ 52.03 (1975 ed.).

also provides that for purposes of determining the limit of Liberty Mutual's liability, all personal injury or property damage "arising out of continuous or repeated exposure to substantially the same general conditions" shall be considered as arising out of one "occurrence." The majority implicitly assumes, and I agree, that this further definition of "occurrence" to mean "continued or repeated exposure to substantially the same general conditions" provides the meaning for construing the deductible clause, even though it applies in terms only to determining the limit of Liberty Mutual's liability.

On various occasions Champion purchased quantities of vinyl-covered paneling. It made a series of sales of this paneling in small lots over a period of several months to 26 different manufacturers. The paneling was ultimately installed, or made into products that were installed, in numerous vehicles. On approximately 1400 occasions the paneling delaminated, giving rise to a single claim for property damage for each instance of a product or vehicle damaged by the delamination.

The majority's initial step toward its conclusion of a single occurrence is to reject the possibility of 1400 different occurrences as somehow inconsistent with the fact that there were 1400 different claims. Reliance is placed on the insured's selection of a "per occurrence" rather than a "per claim" basis for computing the deductible. Of course occurrences and claims are not necessarily the same in number, but they are not necessarily different either. The occurrence is the event that gives rise to the claim. It is entirely possible to have one claim per occurrence, or, if the occurrence is of the sort where one event causes injury to several persons or to property owned by several persons, to have several claims per occurrence. The fact that the insured selected a "per occurrence" basis is of no help in determining whether in the circumstances of this case there has been one

occurrence, or several occurrences, or a number of occurrences precisely equal to the number of claims.

Having rejected the possibility of 1400 occurrences, the majority then uses two different approaches to conclude that the facts of this case constitute one occurrence within the meaning of the Liberty Mutual policy. First, it suggests that the single occurrence is "the delivery of defective panels." Slip op. at 6048. Even if a delivery of defective panels could be considered to be "an accident" or "the same general conditions" exposure to which on a continuous and repeated basis gave rise to the damage, the undeniable fact is that there was not a single delivery. There were at least 26 deliveries to the 26 different manufacturers, and, in view of the periodic sales in small lots, very likely far more than 26 deliveries.

Secondly, the majority endeavors to identify a single occurrence that fits the policy's reference to "property damage arising out of continuous or repeated exposure to substantially the same general conditions." In what seems more like a pun than a construction, the majority observes: "Exposure there was, when Champion sold the paneling, and during this process, it was continuous and repeated." Slip op. at 6051. When Champion sold the paneling, there was created "exposure" to legal liability, not a single occurrence of continuous or repeated exposure to substantially the same general conditions that cause the damage.

In my view the "exposure to conditions" clause has doubtful application to the type of damage that happened in this case, and even if it applies, there would still be 1400 occurrences, not one. That clause concerns damage that occurs when people or property are physically exposed to some injurious phenomenon such as heat, moisture, or radiation. The clause simply broadens the policy's definition of "occurrence" beyond the word "accident" to include a situation where damage occurs (continuously or repeatedly) over a period of time, rather than instantly, as the word "accident" usually connotes. Moreover, the "exposure" clause concerns continuous or repeated exposure to conditions existing at or emanating *from one location*. Indeed, Continental's excess coverage policy, which also defines "occurrence" as an event or a continuous or repeated exposure to conditions, specifically provides that "exposure to substantially the same general conditions existing at or emanating from each premises location shall be deemed to be one occurrence."

To apply the "exposure to conditions" clause to delamination damage puts considerable strain on the words "exposure" and "conditions." The insured contends that the "conditions" to which the property suffering damage was exposed were the defective panels, and that the "exposure" was not the process of selling the panels, as the majority suggests, but rather the installation of the panels. I have difficulty with the concept of a product suffering damage by exposure to its principal component. But even if delamination damage to a product made of laminated paneling can be said to result from "exposure" of the product to the "conditions" of the paneling, that construction of the "exposure" clause does not help decide whether there was one occurrence or 1400. Under this construction, if delamination occurred at a single location, all resulting damage from that delamination would be one occurrence, no matter how gradually the damage was sustained.[1] But 1400 delaminations occurring at 1400 different times and places are 1400 occurrences.

The question is whether an "occurrence" within the meaning of a distributor's product liability policy means

[1] It is equally clear that there can be a single occurrence if property at various locations is damaged by continuous or repeated exposure to a source of injury at a single location, as when one source of radiation causes gradual damage to many items at different places.

the event in which the defect in the product causes damage, or some earlier event in the distribution process. Or, to put it another way, an occurrence means one event, not several events, and the question here is which event is the occurrence contemplated by the policy definition. The cases have consistently construed "occurrence" or "accident" in liability policies to mean the event for which the insured becomes liable, and not some antecedent cause of the injury. See, *e.g.*, *Hamilton Die Cast, Inc.* v. *United States Fidelity and Guaranty Co.*, 508 F.2d 417 (7th Cir. 1975); *Maurice Pincoffs Co.* v. *St. Paul Fire and Marine Insurance Co.*, 447 F.2d 204 (5th Cir. 1971); *Arthur A. Johnson Corp.* v. *Indemnity Insurance Co. of North America*, 7 N.Y.2d 222; 164 N.E. 2d 704 (1959). Even if all of the paneling was improperly manufactured at one time by Champion's vendor (a proposition Continental does not concede and which is not established in the record), that is not the event for which Champion became liable. What Champion became liable for were the 1400 instances of delamination that occurred and caused damage at 1400 different times and places. Each instance of delamination caused damage. There is simply no basis for combining those separate events, widely separated in time and space, into one "occurrence."

2. What makes this case unusual is that both parties are urging precisely the opposite contentions normally advanced by an insured and his insurer when the unitary nature of events is in issue. If several claims are presented, the insured wants payment for each (up to the aggregate limits of his policy), and the insurer usually wants the events viewed as a single occurrence so that payments will not exceed the policy limit for a single occurrence. In this case, the fortuity of a series of small claims, each falling below the deductible amount, has impelled the insured to contend for a single occurrence; otherwise each claim is its responsibility under

the deductible clause. The insurer urges multiple occurrences so that the deductible clause will preclude any liability on its part. But what would the parties be urging (and the majority concluding) if serious personal injury had occurred, resulting in a series of claims each of which exceeded the deductible? Obviously the parties would then be in their accustomed roles, with the insured claiming multiple occurrences, and the insurer claiming a single occurrence. If, for example, a distributor bought a supply of defective tires, sold them to 26 retailers, and 1400 automobiles crashed seriously injuring at least one occupant per crash, would the distributor be urging us to conclude that his policy affords protection only up to the limit provided for one occurrence? Would he be contending that the installation of the tires was an "exposure" to the "conditions" of defective manufacture?

The fact that the claims in this case are small enough to make it advantageous for the insured to contend that the facts show only one occurrence does not persuade me that its position is correct. What concerns me about a decision upholding that position is the implication for future cases where similar reasoning might free an insurer from its proper responsibility for substantial claims. I hope my fears are unwarranted.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of December, one thousand nine hundred and seventy-six.

Present: HON. LEONARD P. MOORE,
HON. WILLIAM H. TIMBERS, C.JJ.,
HON. JON O. NEWMAN, D.J.

75-7664

[Filed Dec. 9, 1976]

CHAMPION INTERNATIONAL CORPORATION,
Plaintiff-Appellee

v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

By: /s/ Vincent A. Carlson
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-seven.

Present: HON. WILLIAM H. TIMBERS,

HON. LEONARD P. MOORE,
Circuit Judges

HON. JON O. NEWMAN,
District Judge

Docket No. 75-7664

[Filed Jan. 26, 1977]

CHAMPION INTERNATIONAL CORPORATION,
Plaintiff-Appellee

v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

By: /s/ Vincent A. Carlson
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of January, one thousand nine hundred and seventy-seven.

Docket No. 75-7664

[Filed Jan. 26, 1977]

CHAMPION INTERNATIONAL CORPORATION,
Plaintiff-Appellee
v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellant

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the defendant-appellant, CONTINENTAL CASUALTY CO., and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Champion International Corporation (Champion) filed this action to recover $1,000,000 from Continental Casualty Company (Continental), one of Champion's insurers. This Court has jurisdiction under 28 U.S.C. § 1332.

Champion sells construction materials, among other things. In 1969 and 1970, Champion bought a large number of vinyl covered plywood panels from Continental Vinyl Products Corporation (Continental Vinyl). Champion then sold the panels to many manufacturers, who installed them in the interiors of houseboats, house trailers, motor homes and campers.[1] Many of the panels were defective; after they were installed, the vinyl covering peeled off and exposed the underlying raw plywood.

More than 1400 vehicles manufactured by at least 26 different firms were damaged by the defective panels. Champion assumed liability for the damages; it paid more than $1.6 million to settle the claims of the manufacturers and the purchasers of the damaged vehicles. The damage sustained by a single vehicle was always less than $5,000.

[1] The panels were usually sold in small lots, as required by the production schedules of the purchasing manufacturers. For example, Cobra Industries, Inc., received 105 separate shipments of the panels from January, 1969, to March, 1970; Cobra manufactured 224 of the damaged trailers from April 9, 1969, to November 19, 1969. Nauta-Line, Inc., manufactured 260 of the damaged houseboats from April 3, 1969, to June 26, 1970.

During 1969 and 1970, when it was discovered that many of the panels were defective, Champion was insured under two policies: a comprehensive general liability policy issued by Liberty Mutual Insurance Company (Liberty), and an umbrella excess third party liability policy issued by the defendant, Continental.

The Liberty policy provided Champion with the following coverage:

> "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which the policy applies, caused by an occurrence . . . but the company shall not be obligated to pay any claim or judgment . . . after the applicable limit of the company's liability has been exhausted by payments of judgments or settlements."

Liberty's coverage was limited to $100,000 for each "occurrence", and $200,000 aggregate, with a $5,000 deductible per occurrence.[3]

The Liberty policy defined "occurrence", "damages", and "property damage" as follows:

> " 'occurrence' means . . . an accident, including injurious exposure to conditions, with results, during the policy period, in bodily injury or property

[3] Endorsement No. 8 of the Liberty policy provided for a designation as to whether the deductible amount was to apply per claim or per occurrence. Per occurrence was chosen. Endorsement No. 8 provided:

"SCHEDULE

Coverage	*Amount and Basis of Deductible*	
Bodily Injury Liability	$	per claim
	$	per occurrence
Property Damage Liability	$	per claim
	$5,000	per occurrence"

> damage neither expected nor intended from the standpoint of the insured . . . ."
>
> "for the purpose of determining the limit of the company's liability . . . all . . . property damage arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as arising out of one occurrence."
>
> " 'damages' includes . . . damages for loss of use of property resulting from property damage[.]"
>
> " 'property damage' means injury to or destruction of tangible property."

The Liberty policy contained a provision on occurrences which result in damage over a long period:

> "If the same occurrence gives rise to . . . property damage which occurs partly before and partly within the policy period, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement."

The Liberty policy also contained a provision relating to a single occurrence which results in property damage sustained by one or more persons.

> "Coverage B—The total liability of the company for all damages because of all property damage sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of property damage liability stated in the declarations as applicable to 'each occurrence'."

The Continental policy provided coverage in excess of Liberty's basic policy. The Continental policy indemnified Champion for all money which Champion was obligated to pay

"for damages, direct or consequential, and expenses, all as defined by the term 'ultimate net loss' on account of . . . Property Damage . . . caused by or arising out of each occurrence."

The Continental policy defined "ultimate net loss" as the

". . . total sum which the Insured or any company as his insurer becomes obligated to pay by reason of . . . Property Damage . . . , either through adjudication or compromise, and all sums paid for expense[s] . . . ."

The limit of Continental's liability was $1,000,000 for any occurrence in excess of the amount recoverable from Liberty. Continental's liability was also limited to $1,000,000 for multiple occurrences.

"Occurrence" was defined as

". . . an event or continuous or repeated exposure to conditions, which unexpectedly causes . . . Property Damage . . . during the policy period."

Finally, the Continental policy contained the following provision:

". . . [I]n the event of loss for which [Champion] has coverage under [underlying insurance], the excess of which would be recoverable hereunder, except for terms and conditions of this policy which are not consistent with the underlying, then, notwithstanding anything contained herein to the contrary, this policy shall be amended to follow the terms and conditions of the applicable underlying insurances in respect of such loss."

Continental admits that the damage to the vehicles which resulted from the defective panels constituted prop-

erty damage covered by the Liberty and Continental policies.[3]

Champion argues that the damages to all of the vehicles arose from a single occurrence. Under this interpretation, Champion may recover all of its damage, less the $5,000 deductible and less the $100,000 paid by Liberty, but not exceeding the $1,000,000 limit of liability.

Continental argues that the damage to each vehicle was a separate occurrence within the meaning of the policies. Because no vehicle sustained damage in excess of $5,000, the amount deductible for each occurrence, Continental argues that Champion is not entitled to anything under the Continental policy.

Each party contends that the language of the policies is clear and unequivocal and supports its contentions. Each party concedes that if a policy is ambiguous, the language is to be construed against the insurance company. The New York rule goes further and provides that if a policy can be reasonably construed in favor of the position asserted by the insured, he is entitled to recover. *See Datalab, Inc. v. St. Paul Fire & Marine Insurance Co.*, 347 F.Supp. 36, 38 (S.D.N.Y. 1972); *Sincoff* v. *Liberty Mutual Fire Ins. Co.*, 11 N.Y.2d 386, 230 N.Y.S.2d 13, 183 N.E.2d 899 (1962). This rule is particularly applicable when the policy is denominated a "comprehensive general liability policy". *National Screen*

[3] I believe that this is a fair conclusion from Continental's admissions that

"(1) the diminution in value of vehicles resulting from the delaminations of the panels constituted property damage within the 'products hazard' as those terms are defined in the Liberty Mutual policy and in the Umbrella Excess policy, and

(2) the liability of Champion for such property damage is a type of liability covered by the Liberty Mutual policy and the Umbrella Excess policy under the 'Products Hazard', subject only to the application of the limits of liability of the policies and the provisions of the policies with respect to other insurance."

Serv. Corp. v. *United States Fidelity and Guaranty Co.*, 364 F.2d 275, 279-280 (2d Cir. 1968). Here the Liberty policy was so denominated. The Continental policy is an umbrella excess third party liability policy, which appears to afford even broader coverage.

I believe that this is a fair rule of construction. The contested provisions of both the Liberty and Continental policies are standard ones. They are in similar policies issued by many companies.

Insurance companies could prepare policies in clear, simple and precise language which would inform insureds of the limits of their coverage. Insurance companies could avoid the risk of ambiguity if they use short and precise words and short and simple sentences to express their intent clearly. In spite of continued admonitions of the courts to get rid of such language, insurance companies continue to issue such policies using insurance jargon and verbose and meaningless generalities, all of which result in ambiguities.

I do not know whether the Continental policy was ever intended to cover this type of loss. But Continental's admissions that this is the type of loss which the policy was designed to cover require me to decide this case solely on whether there was one occurrence which proximately resulted in damage to many vehicles, or whether the damage suffered by each of those vehicles was a separate occurrence.

On this issue, I find in favor of the plaintiff because I find that the contested language is ambiguous. The interpretation urged by the plaintiff may not be the only reasonable interpretation, but it is a reasonable one. That is all plaintiff is required to prove.

In making this determination, I have given no weight to the fact that Liberty, under its policy, paid Champion.

This opinion shall constitute findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

The parties may submit additional findings.

Plaintiff shall submit an appropriate judgment in accordance with this opinion.

Dated this 1st day of May, 1975.

/s/ Gus J. Solomon
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Title]

In a written opinion dated May 1, 1975, I held in favor of the plaintiff on the issue of liability. I held that there was one occurrence which proximately resulted in damage to many vehicles, as opposed to defendant's sole contention that it had no liability under its policies because each of the vehicles damaged was a separate occurrence and the damage to each vehicle was less than $5,000.00, the amount of the deductible for each occurrence.

I assumed that once the issue of liability was determined, there would be no question that plaintiff suffered damages far in excess of the face of the policy. I therefore requested counsel for plaintiff to submit an appropriate judgment. Plaintiff did submit such a judgment for $1,000,000.00 plus interest.

Thereafter, defendant notified me that it had proceeded on the assumption that the issue of damages had been segregated from the issue of liability and that it was now entitled to put on evidence on the issue of damages. Defendant then sought information which went far beyond the issue of damages and which could only be relevant to the issue of liability.

In a memorandum dated June 12, 1975, I stated that I had already decided all issues relating to liability and that I did not propose to consider these issues again.

Both plaintiff and defendant submitted requests for additional findings. In a memorandum dated June 18, I rejected all of them as either unnecessary or incorrect.

Since that time, the defendant has again raised issues of liability. I have considered the authorities on which defendant relies, and I reject them.

On the record heretofore made and on the evidence adduced and the admissions of defendant made at the hearing on damages, held September 29, 1975, I find:

Plaintiff employed the Liberty Mutual Insurance Company to investigate and settle plaintiff's liability for property damage in connection with the delamination of the defective vinyl-covered panels, and this was done with defendant's knowledge and consent and without any admission on the part of the defendant of any liability under its policy;

Liberty Mutual did investigate, adjust and settle a great number of such claims, for which it charged a fee of 15 per cent of the amount of settlement;

As of September 13, 1974, plaintiff paid Liberty Mutual a total of $1,513,116.82 for the settlement of the claims for property damage in connection with the delamination of the defective vinyl-covered panels produced by Continental Vinyl Products Corp. and for expenses and fees for the investigation, adjustment and settlement of those claims;

These payments were reasonable and were made in good faith for the purpose of settling liability against the plaintiff because of the defective vinyl-covered panels which plaintiff had acquired from Continental Vinyl;

Plaintiff paid out in excess of $1,000,000.00 over and above the $100,000.00 paid by Liberty Mutual under its policy and the $5,000.00 deductible under defendant's policy.

I therefore hold that plaintiff is entitled to a judgment against the defendant for $1,000,000.00 with interest

from the dates plaintiff made payments to Liberty Mutual in settlement of the claims against plaintiff.

This memorandum opinion on the issue of damages shall constitute findings of fact and conclusions of law under Fed. R. Civ. P. 52(a).

Plaintiff shall forthwith submit a form of judgment in accordance with this memorandum opinion.

Dated this 31st day of October, 1975.

/s/ Gus J. Solomon
United States District Judge

Supreme Court, U. S.
FILED
JUN 27 1977
MICHAEL RODAK, JR., CLERK

No. 76-1487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

CHAMPION INTERNATIONAL CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Citations

Cases: PAGE

Alabama State Fed'n of Labor v. *McAdory*, 325 U.S. 450 (1945) 25
Aron v. *Gillman*, 309 N.Y. 157, 128 N.E.2d 284 (1955) 19
Atwater & Co. v. *Panama R.R.*, 246 N.Y. 519, 159 N.E. 418 (1927) 19

Becker v. *Frasse & Co.*, 255 N.Y. 10, 173 N.E. 905 (1930) 19
Bronx Sav. Bank v. *Weigandt*, 1 N.Y.2d 545, 136 N.E. 2d 848, 154 N.Y.S.2d 878 (1956) 20

De Backer v. *Brainard*, 396 U.S. 28 (1969) 25

Ellis v. *Dixon*, 349 U.S. 458 (1955) 25
Elston-Richards Storage Co. v. *Indemnity Ins. Co.*, 194 F.Supp. 673 (W.D. Mich. 1960), *aff'd*, 251 F.2d 627 (6th Cir. 1961) 22-23
Empire Properties Corp. v. *Manufacturers Trust Co.*, 288 N.Y. 242, 43 N.E.2d 25 (1942) 19
Erie R. R. v. *Tompkins*, 304 U.S. 64 (1938) 3, 6, 7, 21, 22, 25, 26

General Talking Pictures Corp. v. *Western Elec. Co.*, 304 U.S. 175 (1938) 18

Hartford Acc. & Ind. Co. v. *Wesolowski*, 33 N.Y.2d 169, 305 N.E.2d 907, 350 N.Y.S.2d 895 (1973) 21n
Hartol Prod. Corp. v. *Prudential Ins. Co.*, 290 N.Y. 44, 47 N.E.2d 687 (1943) 20
Hotel Credit Card Corp. v. *American Express Co.*, 13 App. Div.2d 189, 214 N.Y.S.2d 921 (1st Dep't 1961) 19

Johnson Corp. v. *Indemnity Ins. Co.*, 7 N.Y.2d 222, 164 N.E.2d 704, 196 N.Y.S.2d 678 (1959) 21n

PAGE

Lipton, Inc. v. *Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 314 N.E.2d 37, 357 N.Y.S.2d 705 (1974) 16, 20

Magnum Import Co. v. *Coty*, 262 U.S. 159 (1923) 18
McAllister v. *United States*, 348 U.S. 19 (1954) 18
Mitchell v. *Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) 25
S.S. Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959) 26

NLRB v. *Pittsburg Steamship Co.*, 340 U.S. 498 (1951) 18
National Screen Serv. Corp. v. *United States Fid. & Guar. Co.*, 364 F.2d 275 (2d Cir.) *cert. denied*, 385 U.S. 958 (1966) 15n, 20, 23
Needelman v. *United States*, 362 U.S. 600 (1960) 25

Ore & Chem. Corp. v. *Eagle Star Ins. Co.*, 489 F.2d 455 (2d Cir. 1973) 16

Pan American World Air, Inc. v. *Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974) 20

Queens Ins. Co. v. *Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487 (1924) 23, 26

Reliable Press, Inc. v. *Bristol Carpet Cleaning Co.*, 261 App. Div. 256, 25 N.Y.S.2d 70 (1st Dep't 1941) 19
Rescue Army v. *Municipal Court*, 331 U.S. 549 (1947) 25
Rickerson v. *Hartford Fire Ins. Co.*, 149 N.Y. 307, 43 N.E. 856 (1896) 16n
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) 18
Ruhlin v. *New York L. Ins. Co.*, 304 U.S. 202 (1938) 6, 22, 25-26

Sincoff v. *Liberty Mut. Fire Ins. Co.*, 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962) 15n, 16, 20

Other Authorities:

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Preface

This is an insurance case. It revolves around facts, not law. The trial judge, and the Court of Appeals for the Second Circuit, held the petitioner liable for insurance coverage within the plain import of the policy language of the Umbrella Excess Third Party Liability policy issued to respondent by petitioner.

The petition for certiorari is a disservice to this Court. It distorts the record. It creates counterfeit questions for review which mock petitioner's actual contentions below, and the concrete realities of the true record. The inexorable underlying feature of the petition is that it seeks to propel this Court to contribute its own second guess in appraising the unique facts on which adjudication rested.

Petitioner lost below because of the economic and factual setting which rebuffed petitioner's gambit to make

the insurance coverage for which respondent had paid substantial premiums an empty shell. Indeed, the insurance coverage purchased by respondent contained the revised standard form of products liability insurance substituting an "occurrence" basis of coverage for the obsolete "accident" coverage. The petition completely bypasses this significant revision. Indeed, it misleads the Court in inviting belief that under the standard policies "occurrence" is but a synonym for "accident" (Petition, p. 13).

At the trial, petitioner's counsel conceded that it could not prevail with its aggressive distortion of the meaning, purpose and object of the insurance coverage unless its construction is the *only one possible* (JA 143).[1] Petitioner's position collapsed at trial where the factual framework of the controversy made it unmistakably clear to the trial judge that petitioner was playing an arcane game of semantics; the facts established that petitioner was urging a bizarre misreading of the policy provisions that, if accepted, would unabashedly have deprived respondent of coverage on the risk central to its business which it obviously intended to secure.

The Second Circuit, in affirming the trial judge, invoked the record factual demonstration of the "underlying circumstances"; i.e., "the business purposes sought to be achieved by the parties"; the plain language of the Umbrella Excess Policy "supports" the liability of Continental Casualty Company ("Continental"), and liability is singularly warranted to effect the factual business purposes (Petition's Appendix A, pp. 6a-8a). The single dissenter, District Judge Newman, also noted at the outset of his dissent that the lawsuit was hinged to the particular circumstances of this case, as indisputably established by the record (*Id.* 8a).

[1] The letters "JA" refer to the Joint Appendix in the Court of Appeals.

On the petition for rehearing, even the dissenter voted against rehearing. Not a single active circuit judge voted for a rehearing *en banc* (Petition's Appendix C, pp. 16a-18a).

The new counsel retained by petitioner for this Court have strained mightily to de-emphasize the actual adjudications below founded on the evidence presented. Petitioner now seeks to enlist the interest of this Court by contriving fictitious, shadowy, abstract, and even internally contradictory hypothetical "Questions Presented" (Petition, p. 2).

Petitioner's first question, on the actual record is, without further characterization, an effrontery to the Second Circuit. The Second Circuit decided this case on the facts, and far from refusing to apply the laws of New York, decided the appeal in accordance with the New York law. It is truly incredible for petitioner to urge that the Second Circuit was unaware of the doctrine of *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938), one of the most famous cases of this century.

Furthermore, petitioner thumbs its nose at its own trial posture. As the trial judge noted, petitioner itself urged that the policy language is clear and unequivocal, and should be construed by the Court according to its plain meaning (Petition, p. 23a). Because the courts below dared to reject petitioner's misconstruction of the policy, petitioner has invented a spurious question charging that the courts should not have given the policy the plain reading that petitioner itself had urged the courts to do. In a word, petitioner's first question is an amalgam of distortion and self-contradiction.

The second question invented by petitioner is spurious, and unmistakably so. First, there is no burden on interstate commerce simply because petitioner lost. Petitioner at no stage in the proceedings below ever had the temerity

to contend that its defeat on the merits would improperly burden interstate commerce. There is no confusion about the "sources of law to be applied in diversity cases" in interpreting insurance policies. Judge Moore, in his opinion for the Second Circuit panel, explicitly noted: "Both parties in the instant case are agreed that New York law governs the controversy." (Petition's Appendix A, p. 7a). Purely because Judge Moore's opinion then went on to state that respondent was entitled to prevail even without the benefit of the New York decisional law mandating that all ambiguities be resolved in favor of the insured, petitioner now presumes to depict Judge Moore as a confused judge writing for a confused panel, with even a confused dissenter, and indeed the entire Second Circuit as confused since not a single judge voted for rehearing *en banc*.

Petitioner's second question rests upon a false premise; there is absolutely no conflict in the circuits. This case was correctly decided on what petitioner itself has described as the "peculiar facts" and the "unusual circumstances" established on this record (Petition, pp. 9, 16). Petitioner's strained thesis that the decision below introduces "uncertainty" in construction of policy coverage is nullified by two independently conclusive points:

1. Parties to a contract can shape it as they like; hence, petitioner's intellectual charade envisaging a speculative and undefined burden on interstate commerce is wholly academic. Petitioner's litany of fears is resolved by simple draftsmanship, as the trial judge explicitly underscored at trial (JA 141) and in his opinion (Petition's Appendix C, p. 24a).

2. Petitioner in effect conceded below that except for the fortuitous circumstance of an endorsement providing for a deductible, petitioner itself would be interpreting the standard clauses of the insurance policy exactly as respondent urged, and exactly as the courts construed them

(JA 129).[3] In other words, the deductible simply provided a tantalizing opportunity to strain for a construction of standard provisions which petitioner itself knew to be baseless. Petitioner's confession concerning its posture also had an unintended functional utility militating against its petition for certiorari: Petitioner had acknowledged that the existing standard provisions in the insurance policies already provided a clearcut degree of predictability in defining the obligations of the insurance carrier. It ill becomes petitioner, in any event, to seek certiorari on a predicate that the insurance industry is inept at draftsmanship, and that this Court should put aside all other business and function as an expert scrivener for an inept industry.

The third question contrived by petitioner is, without further characterization, semantic nonsense studded with internal contradictions and cloudy abstractions trailing off into a void of uncertainty and confusion. There are no less than seven independently decisive deficiencies in petitioner's final stab at certiorari:

1. Petitioner is flitting back and forth contriving one artifice after another, heedless of internal inconsistency. In its first question, petitioner invents the non-existent thesis that the Court of Appeals failed to follow New York state law. In the third question petitioner postulates that the Court of Appeals should have refused to follow New York state law. This web of confusion is left unravelled in the petition.

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[3] Even in the Petition Continental has in effect acknowledged that its construction of the standard provisions is at war with the construction it would "normally" advance. The presence of a deductible triggered an abnormal contention by Continental tailored to frustrate Champion from receiving even one cent of indemnification for its loss of more than $1,600,000 despite a Comprehensive General Liability policy and petitioner's Umbrella Excess Liability policy (Petition, p. 8).

2. Petitioner invites the Court to "expound" (Petition, p. 17) upon a repeal of the *Erie* doctrine, where no such repeal was urged below, and where there is absolutely no record whatsoever that even remotely serves as a framework for considering such a drastic reversal of such a basic constitutional doctrine.

3. Petitioner's unfocused attack upon the *Erie* doctrine is rebuffed by this Court's unanimous decision in *Ruhlin* v. *New York L. Ins. Co.,* 304 U.S. 202 (1938), decided just seven days after *Erie*. *Ruhlin* also involved a dispute concerning the interpretation of standard clauses in an insurance policy, and Continental's petition collides with this Court's firm ruling:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.
>
> * * *
>
> "Application of the 'State law' to the present case, or any other controversy controlled by Erie R. Co. v. Tompkins, does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. * * *" (304 U.S. at 206, 208-9).

4. In Point I of its brief to the Court of Appeals (p. 22), petitioner stated: "Champion [respondent] has contended, and Continental has not disputed, that New York law applies to the construction of the instant policies. We believe, however, that the New York law is not in conflict with the holdings of any other jurisdiction." In this Court petitioner now invents the very conflict which it had disavowed below.

5. The Court of Appeals based its decision on a factual analysis of the "business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes" (Petition's Appendix A, p. 6a). This case therefore involves merely factual issues of importance only to the litigants; certiorari is inappropriate to review evidence and to discuss specific facts.

6. The evanescent "burden on interstate commerce" contrived by petitioner is a phantom question. The petition makes no effort to explain how this mysterious burden could be eliminated, or even to define the nature of the burden. The burden apparently arises because petitioner lost below; the burden magically disappears if on the facts the courts below had chosen to make contrary findings. In short, petitioner proffers only an intellectual abstraction, and in effect is asking this Court to re-try the case on the facts.

7. Any burden on any insurance carrier flowing from the factual adjudications below, is easily resolvable by draftsmanship. In such a setting, it is incredible for petitioner to ask this Court to engage in an intellectual discourse placing undefined and uncertain fetters upon *Erie R. R. Co.* v. *Tompkins*. The record is so woefully deficient in supporting petitioner's tendered question that petitioner itself is incapable of indicating except with vague generalities precisely what the court below should have done. A clearer illustration of a spurious question so unfocused as to make informed resolution of it virtually impossible, can scarcely be visualized.

Questions Presented on This Petition

In the light of the actual record, the true questions are:

1. Where an insurance policy in its key section, the section determining the amount recoverable thereunder, provides a unifying definitional directive that "all property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence", and where the courts below have found as a fact that the policy was designed to provide coverage on a risk central to respondent's business, namely the hazard of a delamination or similar catastrophe involving a common defect with respect to a huge number of completed products utilizing defective panels acquired from one source, does the Supreme Court sit to re-try the case on the facts so as to determine factually whether there is any basis for frustrating the reasonable expectation and purpose of respondent in entering into, relying upon and paying premiums for the specialized business policy insurance coverage which it had purchased?

2. Does the Supreme Court sit to review fictitious, shadowy, abstract, unfocused and even internally contradictory hypothetical questions, never even raised or passed on below, and lacking the perimeters of a proper or adequate record for review?

3. Does the Supreme Court sit to speculate on a spurious constitutional issue, raised for the first time in the petition, couched in meaningless and open-ended generalities, and which is wholly academic since the problem invented by the petition is clearly remediable by careful and intelligent draftsmanship in fashioning petitioner's standard insurance contracts of adhesion?

Counter-Statement

This case was determined below upon a commonsense appraisal of the concrete economic and factual setting supplying the framework of the "business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes" (Opinion, Petition's Appendix A, p. 6a). Petitioner's attempt, at trial and on appeal, to convert the Comprehensive and Umbrella Excess insurance coverage into an empty charade, collapsed in the face of the findings of fact which controlled the issue of liability. Concisely:

In 1969 and 1970, Champion International Corporation ("Champion") was engaged in the business of purchasing vinyl-covered panels from Continental Vinyl, a California company, and supplying those panels to manufacturers of houseboats, house trailers, motor homes and campers, who used those panels to manufacture their products. Champion purchased from this one source, Continental Vinyl, supplies of vinyl-covered panels sufficient to meet estimated production requirements of Champion's customers as previously communicated to Champion. Shipments of the Continental Vinyl panels were made by Champion to each customer as required by the customer (JA 159, 343, 380, 399-401, 420-1, 437, 584-5; also Petition's Appendix A, p. 2a and Appendix D, p. 19a).

The Continental Vinyl panels sold by Champion to its customers, the manufacturers of the vehicles, had a common latent defect. After the vehicles had been completed, many of the Continental Vinyl panels installed in the products began to delaminate; that is, the vinyl film covering the panels peeled away from the underlying substrate to which the vinyl film had been attached, thereby causing property damage to the completed products by reason of the delamination. The bulk of the installation of the defective panels in completed products occurred in 1969, with

a spillover into 1970 (JA 159, 343-4, 354-7, 364-8, 378-9, 381, 385, 397-400, 404-5, 420, 436-7, 439-40, 584-5; also Petition's Appendix A, p. 3a and Appendix D, p. 19a).

Complaints of delamination from the manufacturers and their customers poured in during 1969 and 1970, when it was discovered that the Continental Vinyl panels had peeled away in the interiors of huge numbers of completed vehicles (JA 159; see also, e.g., JA 308, 312-3, 355-7, 385, 397, 404-7; Petition's Appendix A, p. 3a and Appendix D, p. 20a).

Champion employed Liberty Mutual Insurance Company ("Liberty Mutual") to investigate and settle the claims on a fee basis. Champion paid Liberty Mutual in excess of $1.5 million for the property damage settlements which Liberty had effected. Petitioner conceded the reasonableness of those settlements, and conceded coverage (Petition's Appendix D, pp. 22a-23a).

Champion had purchased extremely broad product liability insurance coverage which fit the delamination catastrophe like a glove. First, respondent had a Comprehensive General Liability policy, written by Liberty Mutual, which covered products' hazards and was in the amount of $100,000 for each "occurrence" ($200,000 aggregate) and subject to a $5,000 deductible "per occurrence"[3] for property damage liability (Petition's Appendix A, p. 3a). The second policy, petitioner's Umbrella Excess policy, picked up the excess over the $100,000 limit of liability in the Liberty Mutual policy. Petitioner's policy indemnified respondent to a limit of $1 million for any occurrence in excess of the amount recoverable from Liberty Mutual (Petition's Appendix A, p. 3a).

The terms of the Liberty Mutual policy were made controlling over the Umbrella Excess policy (Petition's Appendix A, pp. 6a-7a).

The Liberty Mutual policy contained the following clear and emphatic unifying definitional directive:

> "For the purpose of determining the limit of the company's liability * * * all * * * property damage arising out of continuous or repeated exposure to substantially the same general conditions * * * shall be considered as arising out of one occurrence." (Section IV, Limits of Liability; Non-Cumulative of Liability —Same Occurrence, Liberty Mutual Endorsement No. 1) (JA 498-9).[4]

At the trial on liability, despite Liberty Mutual's payment of the full underlying coverage, and despite Champion's loss of more than $1.6 million, petitioner contended that the insurance coverage for the delamination catastrophe was illusory, i.e., that Liberty Mutual should not have

[3] The $5,000 deductible was contained in an endorsement, Endorsement No. 8 (JA 510-11). The printed form of Endorsement No. 8 provided for a designation as to whether the deductible amount was to apply per claim or per occurrence. Per occurrence was chosen. We reproduce the pertinent text of Endorsement No. 8:

"SCHEDULE

Coverage	Amount and Basis of Deductible
Bodily Injury Liability	$ per claim
	$ per occurrence
Property Damage Liability	$ per claim
	$5,000 per occurrence"

Furthermore, Endorsement No. 8, in defining a "per occurrence basis", limited the application of the deductible to "all" [and not each incident of] damages, because of "all property damages as the result of any one occurrence" (JA 510). This definition further refuted petitioner's postulate, echoed in its petition, that the deductible amount should be applied to each incident of property damage, unit by unit, and thereby scrap the unifying definition (quoted at p. 11 *infra*), cancel out Liberty Mutual's Comprehensive coverage, and make petitioner's Umbrella Excess policy completely pointless and illusory.

[4] Continental acknowledged that this unifying definitional directive is "the basic provision" controlling the construction of the Liberty Mutual policy (JA 117-8).

paid anything to Champion, and that petitioner can wriggle out of its undertaking in its Umbrella Excess policy. Petitioner pinned its entire defense to the *sole* and *exclusive* thesis that despite the unifying definition, the damage to each of the manufactured vehicles which utilized defective Continental Vinyl panels was a separate occurrence (Petition's Appendix E, p. 26a). Petitioner in effect urged the trial court, in appraising the evidence, to rewrite the Liberty Mutual policy by now substituting a per claim basis (for that is what petitioner's argument inexorably connoted) for the actual per occurrence basis and, to boot, to seek to define the non-existent per claim basis in terms of treating each damaged completed product as a separate claim. The trial judge, on the record before him, refused to undercut respondent's business purpose and objective in obtaining its package of product liability insurance.[5] The trial judge concluded that respondent's insurance coverage could not be eviscerated by applying the $5,000 deductible separately with respect to every damaged manufactured product, unit by unit (Petition's Appendix D, p. 23a and Appendix E, p. 26a).

The petition suppresses at least five cardinal features of the actual record:

1. At trial, petitioner's counsel, through perceptive questioning by the trial judge, acknowledged, against the backdrop of the record, and confronted with the unifying definition, that petitioner would not be urging its bizarre misreading and misapplication of the standard insurance provisions except for the presence of the $5,000 deductible endorsement.[6] This concession shattered petitioner's trial

[5] In respondent's usual and ordinary plywood operations, in selling panels to manufacturers, the foreseeable damage to a single completed manufactured product almost inevitably would be below $5,000, but the total property damages flowing from a single occurrence could be gigantic, as it was in this case.

[6] (JA 129). Petitioner's counsel also conceded that under the controlling New York law petitioner has the burden of establish-

posture since it revealed that the standard clauses of the policy unmistakably had a plain meaning bringing within the orbit of coverage the delamination catastrophe. That plain meaning carried over in construing the deductible endorsement.[7]

2. In October 1966 the standard provisions of a product liability policy were dramatically revised, and the "occurrence" basis of coverage replaced the "accident" basis. The policies involved in our case were the new standard text. The authoritative works on insurance law, presented at the trial, confirmed the correctness of the trial judge's findings that the facts in our case were squarely within the insurance coverage.[8]

ing "that the reading of the policy, in the manner in which Mr. Shainswit [Champion's counsel] has read it, is an unreasonable construction" (JA 143). At trial, and on appeal, Continental's position on liability collapsed because it could not carry that burden, and manifestly so. Indeed, even without the unifying definition which tied together so explicitly other all-encompassing provisions in the policy, the evidence was overwhelming that all of the property damage from the delamination of the Continental Vinyl panels is to be considered as arising from one occurrence. For example, "occurrence" was defined as meaning "an accident, including injurious exposure to conditions * * *" (JA 493), thereby connoting that the "injurious exposure" could take place over an extended period of time—instead of all at once. Further, the trial judge found the policy also contained a provision relating to a single occurrence which results in property damage sustained by one or more persons or organizations (Petition's Appendix D, p. 21a). And when to all these other provisions is added the policy's rejection of a per claim deductibility standard, petitioner's trial position was reduced to futile, esoteric, semantic exercises in seeking to find a non-existent erasure of coverage.

[7] Even District Judge Newman, in dissent, recognized that the unifying definitional directive "provides the meaning for construing the deductible clause" (Petition's Appendix A, p. 9a).

[8] For example, the Practicing Law Institute ("PLI") publication entitled "Products Liability: Law—Practice—Science" (1967), embodied the expert analysis of Edward C. German, the President, Federation of Insurance Counsel:

> "[T]he 'batch clause' * * * has been eliminated from the new policy. Reliance will now be placed on the aggregate limit

3. At trial, petitioner's counsel also conceded that petitioner had the unfettered power to avoid any adverse precedential impact by simple recourse to proper draftsmanship changing the policy text. The trial judge pointed out the type of language that petitioner could and should have employed if it wanted to eliminate the coverage that respondent Champion had in fact purchased under the existing policy (JA 141). To quote the trial judge: "You [petitioner] had within your power to specifically exclude this particular type of risk, but you elected not to do it." (JA 141). Petitioner's trial gambit was that it could unilaterally rewrite the policy and add an absent limit of coverage by doing a juggling act with the definition of an occurrence, the unifying definitional directive, and the deductibility format. Petitioner itself urged the court to supply a plain meaning of the policy. The trial judge rejected

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in the declarations and *on the last paragraph of the Limits of Liability section* which reads as follows:

> For the purpose of determining the limit of the company's liability, all bodily injury and property damage arising out of the continuous or repeated exposure to substantially the same conditions shall be considered as arising out of one occurrence.

"This language is intended to cover the situation where a tuna canner places a batch of canned tuna on the market which turns out to be injurious to a large number of people, resulting in numerous personal injury suits. Under the new policy this would constitute *one occurrence* and the limits previously placed on each accident would apply." (Emphasis added).

Howard C. Sorensen, at page 7:26 in the aforesaid PLI publication has stressed that the new unifying definition applies to "multiple injury and damage from *common or similar conditions*" (Emphasis added).

Similarly, Nachman: "The New Policy Provisions for General Liability Insurance", which appeared in the Fall 1965 issue of the Society of Chartered Property and Casualty Underwriters, states (p. 199) that the occurrence basis applies with respect to "situations involving a related series of events attributable to the same factor: In this kind of situation, only one accident or occurrence is intended for application of policy limits."

petitioner's verbal legerdemain, and applied to the facts the dispositive precedents.[9]

4. The petition is guilty of a massive distortion in stating, as its threshold predicate, that the trial judge applied New York law "differently from the way the New York Court of Appeals previously had applied it" (Petition, p. 3). Nothing could be further from the truth. In *Stauffer Chem. Co.* v. *Insurance Co. of North America*, 372 F.Supp. 1303, 1308 (S.D.N.Y. 1973) (Gagliardi, J.),[10] Stauffer Chemical Co. was represented by Hart & Hume, Esqs., petitioner's trial and appellate counsel. In their brief to Judge Gagliardi, petitioner's counsel urged the very principle of New York insurance law which the trial judge in our case invoked:

> "In order for an insurer to prevail in its contention that a particular hazard is excluded, the insurer must establish that the words and expressions used are reasonably susceptible of *only*[11] one construction, namely that favorable to the insurer. *Sincoff* v. *Liberty Mutual Fire Insurance Company*, 11 N.Y.2d 386, 390 (1962). [Additional Citations.] If the insured can offer a reasonable interpretation, it must be accepted. *Datatab, Inc.* v. *St. Paul Fire and Marine Insurance Com-*

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[9] *Sincoff* v. *Liberty Mut. Fire Ins. Co.*, 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962), and *National Screen Serv. Corp.* v. *United States Fid. & Guar. Co.*, 364 F.2d 275 (2d Cir.), *cert. denied*, 385 U.S. 958 (1966) (Petition's Appendix D, pp. 23a-24a).

[10] This case, analagous to our case, was invoked by the Second Circuit below (Petition's Appendix A, p. 6a). The petition bypasses this authority. There, in dealing with property damage arising from an ineffective product manufactured by one source causing injury to the crops of dozens of customers in their disparate business locations, the Court described the situation as plainly within the coverage of a policy subsuming under a single occurrence the continuous or repeated exposure to the conditions presented in the *Stauffer Chem.* record (372 F.Supp. at 1305).

[11] The word "only" is underscored in the *Stauffer Chem.* brief.

pany, 374 F.Supp. 36, 38 (S.D.N.Y. 1972)." (Plaintiff's Memorandum on the issue of liability, p. 29).

5. The trial judge focused upon petitioner's admissions that the damage to the vehicles which resulted from the defective panels constituted property damage covered by the Liberty Mutual and Continental policies (Petition's Appendix D, pp. 22a-23a). Given the economic and factual setting in which these policies were written, it was inescapably clear that it was "the reasonable expectation" to have the coverage fulfill the "business purpose" of achieving "substantial economic protection" from the hazard of a delamination or similar catastrophe. *Lipton, Inc.* v. *Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 314 N.E.2d 37, 357 N.Y.S.2d 705, 708 (1974); *Tonkin* v. *California Ins. Co. of San Francisco, Inc.*, 294 N.Y. 326, 329, 62 N.E.2d 215 (1945); *Sincoff* v. *Liberty Mut. Ins. Co.*, 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962).[12]

On appeal, Judge Moore's opinion firmly indicated that petitioner's strained construction that there were 1,400 separate occurrences is at war with any "common-sense appraisal of the overall situation". *Ore & Chem. Corp.* v. *Eagle Star Ins. Co.*, 489 F.2d 455, 457 (2d Cir. 1973).[13] Applying the Liberty Mutual policy provisions to our record (Judge Moore's Opinion, Petition's Appendix A, pp. 2a-8a):

[12] We refer also to *Rickerson* v. *Hartford Fire Ins. Co.*, 149 N.Y. 307, 313, 43 N.E. 856 (1896), where the Court of Appeals stressed that *in all insurance cases*, no rule is more "imperative or controlling" than the mandate: "When the words are, without violence, susceptible of two interpretations, that which will sustain [the insured's] claim and cover the loss must, in preference, be adopted."

[13] As attested by the citations in *Ore & Chem. Corp.*, 489 F.2d at 457, New York's decisional law has emphasized that in applying an insurance policy to a set of facts, the outcome "should be determined not by precise semantic shadings of terms of art, but by common-sense appraisal of the overall situation".

(a) the "*injurious exposure*" resulting in property damage has been the installation of defective vinyl-laminated plywood panels in completed products manufactured by others;

(b) the "*conditions*" to which the property suffering damage has been exposed are the *defective panels manufactured by Continental Vinyl which inexorably delaminated following installation;* and

(c) all diminution in value (*property damage*) resulting from the continuous or repeated installation by manufacturers in a completed product (*exposure*) of defective panels manufactured by Continental Vinyl which inexorably delaminated (*substantially the same general conditions*) constitutes property damage arising out of one occurrence within the meaning of the Liberty Mutual policy.[14]

In the instant petition, Continental is seeking to prolong its seven-year failure to fulfill its clear insurance obligations to respondent. The petition is unworthy.

[14] Even without a unifying definitional directive, the New York Court of Appeals has ruled that the term "occurrence" in a comprehensive policy is sufficiently broad so as to encompass all of the claims of property damage arising out of a common defect in the manufacture by the insured of ski straps which had been sold to the insured's customers for incorporation in ski bindings ultimately sold by the ski retailers. *Sturges Mfg. Co.* v. *Utica Mut. Ins. Co.*, 37 N.Y.2d 69, 332 N.E.2d 319, 371 N.Y.S.2d 444 (1975).

ARGUMENT

1. Petitioner's "Question 1" is non-existent. The Court of Appeals based its decision on a proper and correct *factual* analysis of the "business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes" (Petition's Appendix A, p. 6a), and in full accord with New York law.

Petitioner lost below because of the *facts,* which demolished its bizarre thesis that the Comprehensive General Liability policy, and the Umbrella Excess policy, by some alchemy, did not provide coverage for the delamination catastrophe. *In the setting of the record,* the Court of Appeals concluded that the property damage here involved patently resulted from "a continuous or *repeated exposure* to *substantially* the *same general conditions*", and therefore arose out of *one* occurrence, within the meaning and effect of the policy's unifying definitional directive.

It is axiomatic that this honorable Court does not grant certiorari to review evidence and to discuss specific facts. The Supreme Court will not re-try this case on the facts merely to give a defeated party in the Court of Appeals another hearing to determine factually whether there is any basis for frustrating the reasonable expectation and purpose of respondent in entering into, relying upon and paying premiums for the specialized Comprehensive General Liability and Umbrella Excess policies. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925); *General Talking Pictures Corp.* v. *Western Elec. Co.,* 304 U.S. 175, 178 (1938); *Southern Power Co.* v. *North Carolina Pub. Serv. Co.,* 263 U.S. 508 (1924); *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923); *NLRB* v. *Pittsburg Steamship Co.,* 340 U.S. 498, 502, 503 (1951); *Rogers* v. *Missouri Pac. R.R.,* 352 U.S. 500, 524, 559 (1957) (dissenting opinions by Mr. Justice Frankfurter and Mr. Justice Harlan); *McAllister* v. *United States,* 348 U.S. 19, 23 (1954) (separate opinion by Mr. Justice Frankfurter in favor of dismissal of writ as improvidently granted: "If there is any class of cases which plainly falls outside the professed considerations by which this Court exercises its discretionary jurisdiction, it is cases involving only interpretation of facts bearing on the issue of causation or negligence.").

As we have noted, the petition grossly distorts Judge Moore's opinion below. Far from refusing to apply New York law, Judge Moore expressly observed that "New York law governs the controversy" (Petition's Appendix A, p. 7a). Indeed, in focusing upon the business purposes promoted by the Comprehensive General Liability and Umbrella Excess policies, as established on this record, namely to secure coverage on a risk central to respondent's business, the Second Circuit interpreted the insurance policies, in their factual setting, in complete conformity with the New York law of contracts. The Second Circuit echoed New York law in construing the policies, and upholding petitioner's liability, in light of the surrounding business purposes coupled with the plain meaning of the words adopted to give the policies a sensible purpose in their economic setting. *Becker* v. *Frasse & Co.,* 255 N.Y. 10, 14, 15, 173 N.E. 905 (1930) (Cardozo, C.J.); *Atwater & Co.* v. *Panama R.R.,* 246 N.Y. 519, 524, 159 N.E. 418 (1927); *Hotel Credit Card Corp.* v. *American Express Co.,* 13 App. Div. 2d 189, 214 N.Y.S.2d 921 (1st Dep't 1961) (Breitel, J.); *Reliable Press, Inc.* v. *Bristol Carpet Cleaning Co.,* 261 App. Div. 256, 25 N.Y.S.2d 70 (1st Dep't 1941).

The New York courts will first ascertain the business purpose of the contract and then, where the parties have chosen words which leave room for construction, choose such construction which will carry out the business purpose. *Empire Properties Corp.* v. *Manufacturers Trust Co.,* 288 N.Y. 242, 248-9, 43 N.E.2d 25 (1942) (Lehman, C.J.); *Aron* v. *Gillman,* 309 N.Y. 157, 163, 128 N.E.2d 284, 288

(1955). Specifically, with respect to product liability insurance policies, it is bedrock law in New York that the obvious intent of an insured, given the economic and factual setting in which such policies are written, to secure substantial economic protection from exposure to claims of third parties in consequence of defects in products, controls adjudication of liability where the insurer, like Continental here, is seeking to wriggle out of its undertaking. *Lipton, Inc.* v. *Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 314 N.E.2d 37, 357 N.Y.S.2d 705, 708 (1974). Where, as factually established, it was the reasonable expectation of respondent to have the Comprehensive and Umbrella Excess policies fulfill the business purpose of protecting against the hazard of a delamination catastrophe, no niggardly construction, founded upon semantic legerdemain, will be tolerated to defeat the meaning, purpose and object of the insurance coverage. *Sincoff* v. *Liberty Mut. Ins. Co.*, 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962);[15] *Tonkin* v. *California Ins. Co.*, 294 N.Y. 326, 329, 62 N.E.2d 215 (1945); *National Screen Serv. Corp.* v. *United States Fid. & Guar. Co.*, 364 F.2d 275 (2d Cir.), *cert. denied*, 385 U.S. 958 (1966).

New York also applies, with special vigor to a policy by its own terms denominated a "Comprehensive General Liability policy", a cardinal rule of construction that any ambiguity would be resolved against the insurer; the burden which the insurer must carry is to show, clearly and conclusively, that the construction it urges is the *only* one that fairly could be placed on the policy. *Sincoff, supra; Tonkin, supra; Bronx Sav. Bank* v. *Weigandt*, 1 N.Y.2d 545, 551-2, 136 N.E.2d 848, 154 N.Y.S.2d 878 (1956); *Hartol Prod. Corp.* v. *Prudential Ins. Co.*, 290 N.Y. 44, 49-50, 47

[15] In *Pan American World Air, Inc.* v. *Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1000 (2d Cir. 1974), the Court of Appeals unanimously emphasized: "*Sincoff* states the well-established New York rule for all types of insurance."

N.E.2d 687 (1943).[16] The Second Circuit, below, found it unnecessary to further bolster its decision by invoking the firm concept of New York insurance law dealing with resolution of ambiguity since the factual circumstances of the manifest business purposes, and the plain meaning of the policy language, already rebuffed, conclusively, petitioner's self-serving semantic shadings and evisceration of the insurance coverage that was within the reasonable expectation and purpose of respondent (Petition's Appendix A, p. 7a). The petition rewrites Judge Moore's opinion and simulates that by emphasizing that it was unnecessary to rely on the New York rule of ambiguity, Judge Moore, and the Second Circuit as a whole, were somehow defying the *Erie* doctrine, notwithstanding that the Second Circuit had decided the appeal in precise accord with the New York decisional law as above indicated. The petition's Question 1 is unmistakably spurious.

[16] The two New York citations on which petitioner hinges Question 1, are woefully wide of the mark. They do not impinge in the slightest on our exposition of the New York law. *Johnson Corp.* v. *Indemnity Ins. Co.*, 7 N.Y.2d 222, 164 N.E.2d 704, 196 N.Y.S.2d 678 (1959)—cited in petition at pp. 11-12—has nothing to do with products hazard liability coverage. Further, the opinion provides no comfort for Continental. In connection with subway construction, the issue presented was whether there was one accident or two accidents within the coverage of a liability policy providing for "$50,000 each accident." *The policy said nothing more than that.* Needless to say, the policy totally lacked the definition of our Liberty Mutual policy that all property damage arising out of continuous or repeated exposure to substantially the same general conditions, shall be considered as arising out of one occurrence. In finding that there were two separate accidents, thereby *increasing* the carrier's liability, the Court stressed that the insured was entitled to *fuller* indemnification because of the "reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract" (7 N.Y.2d at 227).

In *Hartford Acc. & Ind. Co.* v. *Wesolowski*, 33 N.Y.2d 169, 173, 305 N.E.2d 907, 350 N.Y.S.2d 895, 899, (1973) (Petition, *ibid.*), the Court simply ruled that in "the perspective and expectation of the ordinary purchaser" of an automobile liability policy a "three-car accident" was a single accident.

2. Petitioner's "Question 2" is spurious. There is absolutely no conflict in the circuits. There is no burden on interstate commerce simply because petitioner lost on the facts. Petitioner's litany of fears is resolved by simple draftsmanship.

Petitioner's Question 2 is, without further characterization, absolutely bizarre. It is punctuated with misconception after misconception:

(a) Petitioner's entire question is fictitious. The decision by the Second Circuit was based on the facts, and in full accord with New York law.

(b) Application of *Erie* per force envisages differences in adjudications among different circuits applying different concepts of state law. *Ruhlin* v. *New York L. Ins. Co.*, 304 U.S. 202 (1938)—quoted at page 6 hereinabove—establishes that a suggested conflict among the circuits is in truth non-existent where the "conflict may be merely corollary to a permissible difference of opinion in the state courts".

(c) Petitioner interlards in its discussion a false argument that the term "accident" is synonymous with "occurrence" (Petition, p. 13). As we have seen, our policies reflect the dramatic revision in October 1966 whereby the insurance industry substituted an "occurrence" basis of coverage for the "accident" basis (pp. 13-14 hereinabove). *Elston-Richards Storage Co.* v. *Indemnity Ins. Co.*, 194 F. Supp. 673 (W.D. Mich. 1960), *aff'd*, 251 F.2d 627 (6th Cir. 1961)—cited in petition at page 13—is absolutely irrelevant. There, a warehouseman liability policy was totally silent, lacking even a shred of definition as to what was contemplated by the parties as constituting "one event or occurrence". Here, we have a wealth of policy provisions, capped by the unifying definition, tying together as arising out of one occurrence, all the property damage flowing from the delamination of the Continental Vinyl panels.

The unifying definition, which emerged in the 1966 revision, per force overruled in any event any invocation of *Elston-Richards*, decided six years earlier. This was pointed out by the trial judge at our trial (JA 136). Further, *Elston-Richards*, 194 F. Supp. at 679, reveals that if the court in Michigan had had before it the products liability policy containing the Liberty Mutual provisions, and especially the unifying definition, to implement the business purpose of the policy, the court unmistakably would have been constrained to construe the policy just as the Court of Appeals in our case construed it. And if more need be said, the decision below is fortified by the New York decisional law that we have presented. Under the New York law, it is unquestionable that petitioner's rewriting of the Liberty Mutual policy so as to equate each incident of damage to a vehicle as a separate occurrence, and thereby frustrate respondent from receiving even one cent of indemnification for its stupendous loss, runs afoul of the New York law. In *National Screen Serv. Corp.* v. *United States Fid. & Guar. Co.*, 364 F.2d 275 (2d Cir.), *cert. denied*, 385 U.S. 958 (1966), *supra*, the Second Circuit had ruled that the firm concepts of New York insurance law were so strong that the Court was constrained to rule in favor of the insured, despite the fact that the Ninth Circuit, on a set of facts virtually identical to those in *National Screen*, decided in favor of the insurer (364 F.2d at 280). Certiorari was denied by this Court, where the respondent had predicated its opposition to the writ on the settled teaching of *Ruhlin*.

(d) Capping everything, it is silly for petitioner to invent the non-existent burden on interstate commerce simply because it lost on the facts. In the words of Mr. Justice Holmes, speaking for the unanimous Court, in *Queens Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 492 (1924), "the parties can shape their contract as they like." Consequently, petitioner's non-existent fears are in any event resolved by simple draftsmanship, as the trial judge

explicitly underscored at trial (JA 141) and in his opinion (Petition's Appendix C, p. 24a).

All in all, petitioner's question 2 is a counterfeit question, resting upon a false premise, and completely at war with the concrete realities of the true record.

3. Petitioner's "Question 3" is chimerical. It is squarely contradictory of petitioner's "Question 1" and tenders only cloudy and meaningless abstractions which violate every tenet of certiorari. Capping everything, this shadowy question was never even raised or passed on below, and lacks the perimeters of a proper or adequate record for review.

The third question contrived by petitioner is an amalgam of confusion, contradiction and abstraction culminating in a void of unfocused speculation without even a shred of support in the record. We have already pointed out (pp. 5-7 hereinabove) that petitioner's evanescent final stab at certiorari encounters at least seven independently decisive roadblocks:

(a) The third question is squarely at odds with the petition's first question. The petition has no faith in the first question because that question, as we have seen, is so transparently spurious. Accordingly, on the heels of the non-existent thesis that the Court of Appeals failed to follow New York state law, the petitioner now postulates that the Court of Appeals should have refused to follow New York state law. The petition is simply indulging in one unworthy artifice after another, heedless of internal inconsistency. That inconsistency dramatizes the sleight of hand, semantic confusion which is the hallmark of the petition as a whole.

Indeed, it is preposterous for petitioner to fabricate, solely for purposes of certiorari, a counterfeit question that the Second Circuit should have refused to decide the

case under New York law, in the face of petitioner's own urgings in the Second Circuit that New York law governs the controversy (Petition's Appendix A, p. 7a).

(b) The petition's invitation that the Court should "expound" (Petition, p. 17) upon a repeal of the *Erie* doctrine, in the total absence of any kind of factual record that could serve as a framework for an academic consideration of such a drastic reversal of such a basic constitutional doctrine, and where no such fanciful repeal was even intimated below, collides with the ground rules for a writ of certiorari. "What has been alleged is entirely too amorphous to permit adjudication of the constitutional issues asserted. * * * This Court has often refused to decide constitutional questions on an inadequate record." *Ellis* v. *Dixon*, 349 U.S. 458, 462, 466 (1955); *Needelman* v. *United States*, 362 U.S. 600 (1960); *Mitchell* v. *Oregon Frozen Foods Co.*, 361 U.S. 231 (1960).

Furthermore, it has long been the considered practice of this honorable Court not to decide abstract, hypothetical or contingent questions, especially so where this Court is unabashedly requested to engage in an intellectual discourse placing undefined and uncertain fetters upon no less a doctrine than that of *Erie* v. *Tompkins*. *Alabama State Fed'n of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945); *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568, 584 (1947); *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961).

The foregoing authorities apply *a fortiori* where the petition's unfocused attack upon the *Erie* doctrine was never even raised or passed on below. *De Backer* v. *Brainard*, 396 U.S. 28 (1969).

(c) *Ruhlin* v. *New York L. Ins. Co.*, 304 U.S. 202 (1938), as we have noted, was decided just seven days after *Erie*. *Ruhlin* makes it indisputably clear that the *Erie* requirement that the federal courts look to the particular state law which may control adjudication, poses no "duties dif-

ficult or strange" (304 U.S. at 209). *Ruhlin*, without more, disposes of petitioner's Question 3.

(d) Petitioner itself admitted that the New York law, which demolishes petitioner's bizarre misconstruction of the policy provisions, is not in conflict with the holdings of any other jurisdiction. Thus, Question 3 is postulated on the existence of a conflict which petitioner, when it had no motive for obfuscation, completely disavowed below (p. 6 hereinabove).

(e) Petitioner's tendered question, to the extent that it is susceptible of a coherent thesis, asks in effect that this Court review the Second Circuit's factual analysis. As already noted, certiorari is inappropriate for such a purpose.

(f) The third question makes no effort to explain how the phantom "burden on interstate commerce" can be eliminated, or even to define the nature of the burden in terms other than registering unhappiness that petitioner lost on the facts (p. 7 hereinabove).

(g) Finally, petitioner cannot extinguish the dispositive point that any burden on any insurance carrier flowing from the factual adjudications below, is easily resolvable by draftsmanship. Petitioner is grasping at straws in urging that this Court should engage in an intellectual discourse placing undefined limitations upon *Erie*, solely to resolve a problem of draftsmanship, "when the party drafting such a form contract has not included a provision it easily might have." *S.S. Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). *See also, Queens Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 492 (1924).

Petitioner's Question 3 is thus riddled with one deficiency after another precluding certiorari.

CONCLUSION

The petition is singularly devoid of merit and should be denied.

Dated: New York, New York
June 24, 1977

Respectfully submitted,

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No. 76-1487

In the Supreme Court of the United States

OCTOBER TERM, 1977

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

CHAMPION INTERNATIONAL CORPORATION

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Champion's Opposition attempts to characterize this case as a garden-variety application by the court of appeals of settled New York law to particular facts, and as one that therefore does not warrant further consideration (Opp. at 18). In fact, the Petition for Certiorari presents significant legal questions which raise fundamental constitutional issues concerning the sources of the law to be applied by lower federal courts in the exercise of their diversity jurisdiction. Resolution of these questions is required first to eliminate the unfortunate uncertainty that this case now creates in insurance law, and second to eliminate a potentially substantial burden on interstate commerce in products liability insurance.

1. In diversity cases, questions concerning the proper construction of contracts of insurance are governed by

the entire body of substantive law expounded by the courts of the appropriate state. *Ruhlin* v. *New York Life Insurance Co.*, 304 U.S. 202, 205 (1938); *see Miree* v. *DeKalb County*, No. 76-607, decided June 21, 1977, slip op. at 3. Despite Champion's attempt, by quotation of part of a sentence from the lower court's decision (Opp. at 3-4, 19), to create the misimpression that it applied the law of New York, the face of the opinion clearly demonstrates that the Second Circuit did *not* apply State law but, instead, interpreted the language of the contract according to its own, necessarily federal principles of construction.

The threshold question facing the Second Circuit was whether the language of the policy—specifically the term "occurrence"—could be construed on its face. Under well-established principles of federal law governing diversity cases, this in itself is a question to be decided under New York law. The New York Court of Appeals has unambiguously held that such operative words defining the number of separate "events" entitled to insurance coverage are terms of art whose meaning cannot be facially determined but must be resolved in accordance with an underlying theory of causation.

The Second Circuit deviated from the rule of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), when it erroneously interpreted the term "occurrence" in accordance with its own, or federal, construction of the contract, instead of applying well-established New York law. The New York cases authoritatively hold that separate "events" of injury constitute multiple "occurrences" for insurance purposes when, as here, the instances of damage are remote in time and space from one another and no one incident of damage caused another. *See Arthur A. Johnson Corp.* v. *Indemnity Insurance Co.*, 7 N.Y.2d 222, 196 N.Y.S.2d 678, 683, 164 N.E.2d 704 (1959); *Hartford Accident & Indemnity Co.* v. *Wesolowski*, 33

N.Y.2d 169, 350 N.Y.S.2d 895, 305 N.E.2d 907 (1973); *Sturges Mfg. Co.* v. *Utica Mutual Life Ins. Co.*, 37 N.Y.2d 69, 371 N.Y.S.2d 444, 332 N.E.2d 319 (1975). If the Second Circuit had looked to and followed New York substantive law, as required by *Erie*, it would have reversed the district court.[1]

2. Moreover, the Second Circuit's decision has created a square conflict among the courts of appeals. *See Maurice Pincoffs Co.* v. *St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971); *Hamilton Die Cast, Inc.* v. *United States Fidelity & Guaranty Co.*, 508 F.2d 417, 420 (7th Cir. 1975). The conflict does not, as Champion suggests (Opp. at 6, 22, 25-26), concern the propriety of inconsistent results stemming from a "permissible difference" in state court rules which, under *Erie*, the federal courts must apply in diversity cases. Rather, the conflict concerns whether federal diversity courts must look to State law for the substantive definition of the term "occurrence" in insurance policies or whether the Constitution grants federal courts the power to formulate an independent body of contract law. Champion has not challenged our assertion that the Fifth and Seventh Circuits have unambiguously held that federal courts must apply State law in defining this term.

The uncertainty in the source of commercial law to be applied in diversity cases created by the Second Circuit's decision warrants immediate clarification. The court of appeals' decision threatens to unsettle the parties' expectations concerning the law which will govern insurance

[1] Champion nevertheless argues that the court of appeals reached the same result as the New York courts would have reached. Champion's assertion is premised on a collection of New York cases reciting general canons of construction to be used in interpreting insurance policies (Opp. at 19-20). The general canons cited by Champion are irrelevant to the issues in this case, however, because the New York Court of Appeals has already rendered precise holdings on the point of law that frustrates Champion's claim.

contracts covering a large portion of the nation's insurance commerce and thus may impose a substantial burden on interstate commerce. The practical problems created by the decision below therefore are of sufficient significance to warrant the grant of certiorari.

Two terms ago, this Court considered a similar diversity case, in which the court of appeals refused to apply the conflict of law rule of the State which created the underlying cause of action, but instead formulated and applied its own principle. *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3 (1975). In a *per curiam* opinion, the Court granted certiorari, vacated the judgment below and remanded the case with instructions that the court of appeals identify and follow the conflict rule of the appropriate State. *Id.* at 4-5. In light of the explicit decision of the Second Circuit not to apply New York law on the threshold legal question presented to it but to adopt its own rules of interpretation, a disposition like that in *Challoner* would be equally appropriate here. Therefore, we respectfully submit that the judgment of the court of appeals should be vacated and the case remanded for determination and application of New York law.

3. The court of appeals' refusal to follow New York law also leaves open the question whether its departure from *Erie* could be justified because application of State law would have imposed an unconstitutional burden on interstate commerce.[2] The New York cases themselves contain extensive discussions of the three different theories of causation applied by various states in determining the number of separate "events" covered by insurance policies. *See, e.g., Arthur A. Johnson Corp.* v. *Indemnity Insurance Co., supra.* And it has long been established that the Commerce Clause imposes restrictions on the States' selection of substantive laws in fields normally reserved to their discretion. *See* Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 Harv. L. Rev. 806 (1971); *cf. Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). This case presents an appropriate vehicle for consideration of whether the Commerce Clause acts as an independent constitutional constraint upon federal courts' obligations under *Erie* to apply State law in diversity cases.[3]

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[2] In apparent reliance on the doctrine of *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958), Champion suggests that this argument cannot be considered in this Court because the argument was not raised below. However, this question entered the case for the first time only after the court of appeals refused to apply New York law. Therefore, the jurisprudential principle stated in *Lawn* is inapplicable here, because the issue could not have been raised at any earlier stage of this litigation.

[3] Champion also suggests (Opp. at 4, 14) that this case does not warrant further consideration because the prevalent uncertainty as to the meaning of the term "occurrence" is a product of faulty draftsmanship which the insurance industry itself may someday alleviate. However, as noted in the Petition (Pet. at 11 n.8), the ambiguity cannot be eliminated by redrafting the definition of the "event" which gives rise to a right of compensation. The inconsistency in interpretation persists because several States adhere to different and incompatible theories of causation. Thus, the same conflict of authority has emerged after each industry attempt to rewrite the operative terms of its policies. *See Elston-Richards Storage Co.* v. *Indemnity Insurance Co.*, 194 F. Supp. 673 (W.D. Mich. 1960), *aff'd*, 251 F.2d 627 (6th Cir. 1961), and *Union Carbide Corp.* v. *Travelers Indemnity Co.*, 399 F. Supp. 12 (W.D. Pa. 1975); *compare* the partial history of the drafting of the current definition at Opp. 13-14 n.8 *with Maurice Pincoffs Co.* v. *St. Paul Fire & Marine Ins. Co., supra.* In any event, the Petition does not seek this Court's interpretation of a contractual provision but instead seeks resolution of the source of the law to which a federal diversity court should look in interpreting such language.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JULY 1977.